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March 5, 2018

By Hand Delivery

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423



Re: Docket No. FD 36167, *Jimmy Lee Waneck and Starr Swearingen Waneck, et al. – Petition for Declaratory Order*

Dear Ms. Brown:

Enclosed for filing in the above referenced proceeding is an original and ten copies of a Petition for Declaratory Order filed on behalf of Jimmy Lee Waneck and Starr Swearingen Waneck and the other parties listed in Appendix A to the petition. Also enclosed is a check in the amount of \$1400 to cover the required filing fee.

Please do not hesitate to call the undersigned if you have any questions.

FILED

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MAR 05 2018

**SURFACE
TRANSPORTATION BOARD**

Sincerely,

Thomas W. Wilcox

Thomas W. Wilcox
An Attorney for Petitioners

MAR 05 2018

**SURFACE
TRANSPORTATION BOARD**

cc: The individuals listed in the Certificate of Service attached to the Petition

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36167

**JIMMY LEE WANECK AND STARR SWEARINGEN WANECK, ET AL. --
PETITION FOR DECLARATORY ORDER**

Pursuant to 4 U.S.C. §554(e) and 49 U.S.C. §721, Mr. Jimmy Lee Waneck and Mr. Starr Swearingen Waneck, for themselves and the 58 other individuals listed in Appendix A (“Petitioners”) hereby petition the Surface Transportation Board (“Board” or “STB”) for an order declaring that 49 U.S.C. §10501(b) does not preempt state tort law claims brought against railroads that fall within the categories set forth in 45 U.S.C. §20106(b), a provision of the Federal Railway Safety Act, 45 U.S.C. §20101 *et seq.* (“FRSA”).

**I.
INTRODUCTION AND FACTUAL BACKGROUND**

A. Identity of Petitioners and Description of the Collision that Prompted the State Court Lawsuits at Issue

Petitioner Starr Swearingen Waneck and 49 of the individuals listed in Appendix A were passengers on a tour bus traveling from Austin, Texas to the Boomtown Casino in Biloxi, Mississippi on March 7, 2017, when the bus was struck by a freight train owned and operated by CSX Transportation Company (“CSXT”) at a road crossing of CSXT’s tracks in Biloxi. Petitioner Jimmy Lee Waneck is her spouse. The tour bus was struck after it had become “high centered” on the asphalt road bed of the crossing, meaning that when the driver attempted to drive across the CSXT tracks the bus’s wheels were lifted off the ground by the overall height of the accumulated

layers of asphalt making up the crossing. Because it was stuck on the asphalt hump, the bus was unable to clear the crossing. Some of the passengers were able to evacuate the bus and move to a location that was out of harm's way. However, a CSXT train soon appeared traveling toward the charter bus. The train's conductor failed to stop the train prior to it reaching the crossing and it collided with the tour bus, shoving it 203 feet down the track and causing several fatalities and numerous life-altering injuries to the passengers who had not been able to escape the collision, including Ms. Waneck, who sustained serious injuries. The collision is currently under investigation by the National Transportation Safety Board. See Preliminary Report for NTSB matter Highway HWY17MH010, attached hereto as Appendix B.

The passengers and their surviving family members subsequently filed multiple lawsuits against CSXT, its parent company CSX Corporation, and the tour bus operators and owners in state courts, including the Circuit Court of Harrison County, Mississippi and the 44th Judicial District Court, Dallas County, Texas.¹ These state court suits sought damages in tort from CSXT and the other defendants. Most pertinent to this Petition, the complaints included among their claims allegations that CSXT had acted negligently by not inspecting, repairing and maintaining the crossing, operating its train in a manner that did not allow the train to stop in time to avoid the collision, and generally breaching a federal duty of care concerning its ownership and maintenance of the crossing, and the operation of its trains over the crossing.

¹ The two primary cases are *Starr Swearingen Waneck and Jimmy Lee Waneck v. CSX Transportation Inc., et al.*, C.A. No. 1:17-cv-00106 ("*Waneck*"); and *Dee Voight, et al. v. CSXT Transportation, Inc., et al.*, C.A. No. 3:17-cv-01018 ("*Voight*"). True and correct copies of the First Amended Complaint filed in the Mississippi state court, and the Plaintiff's Original Petition filed in the Texas state court are attached to this Petition as Appendices C and D. Cases were also filed in the 192nd Judicial District, Dallas County, Texas, and additional cases could be filed by Petitioners in these and other jurisdictions.

B. The Voight Case

The Original Petition filed in the *Voight* case contained general allegations of negligence on the part of CSXT, including that CSXT breached (1) its duty to maintain the crossing and its grade; (2) its duties to the driving public to act reasonably when maintaining the crossing to ensure that it was not ultrahazardous or so that persons using ordinary care could not pass over it safely, (3) its duty to warn the driving public of the existence of any ultrahazardous conditions at the crossing. The complaint also alleged that CSXT failed to act reasonably because it failed to prevent the ultrahazardous conditions. The Original Petition did not specifically allege that CSXT had breached any federally mandated obligation or regulation of the Federal Railroad Administration (“FRA”).

C. The Waneck Case

The First Amended Complaint in the *Waneck* case contained numerous specific allegations of negligence on the part of CSXT. These included multiple allegations that CSXT and its employees breached their duties to (1) exercise reasonable care to avoid killing or injuring members of the public, (2) operate the train at a speed for the then existing conditions, to and (3) keep a proper lookout and take precautions to protect the crossing, among other, similar allegations. Appendix C at ¶ 35-36. The complaint also contained specific allegations that CSXT acted negligently by violating the federal standard of care established by certain rail safety regulations promulgated by the FRA, *Id.* at ¶¶ 39 (a)-(d), and by CSXT’s own rules and railroad industry standards governing proper railroad crossing maintenance. *Id.* at ¶ 40-46.

D. The Parties’ Preemption Arguments

CSXT responded to the *Waneck* and *Voight* cases by filing notices pursuant to 28 U.S.C. §1445 to remove the *Waneck* case to the District Court for the Southern District of Mississippi, and to remove the *Voight* case to the District Court for the Northern District of Texas, Dallas

Division, respectively. Once removed, CSXT filed motions in both federal courts to dismiss the Plaintiffs' state tort law claims for lack of subject matter jurisdiction, namely that the state claims were preempted. In the *Voight* case, CSXT's preemption arguments were based almost exclusively on an argument that all the state law tort claims were completely preempted by 49 U.S.C. §10501(b). In addition to also claiming §10501(b) complete preemption in the *Waneck* case, CSXT also argued that all the tort claims in that case regarding CSXT's alleged negligence in maintaining the crossing, failing to operate its trains in a safe manner, etc., were completely preempted by the FRSA.

All the plaintiffs and CSXT's co-defendants in both cases objected to CSXT's preemption claims. In the *Voight* case, the named plaintiff Dee Voight moved on behalf of all the plaintiffs to remand the case back to the Texas state court. This motion was based primarily on the argument that the Petitioners' state law tort claims were not preempted by §10501(b), but did not address the FRSA or, specifically, 49 U.S.C. §20106(b).

The Wanecks and CSXT's co-defendants in the *Waneck* case have raised similar arguments in their briefs opposing CSXT's motion to dismiss the complaint for lack of subject matter jurisdiction, which remains pending before the court.² In addition, the Wanecks asserted that their state law claims were preserved by the FRSA through the savings clause expressly preserving such state law causes of action that was enacted in 2007 and codified at 49 U.S.C. §20106(b). This provision states as follows:

(b) Clarification Regarding State Law Causes of Action. –

² All action in the *Waneck* case has been effectively stayed by the Court pending the completion of discovery and briefing concerning certain jurisdictional issues unrelated to the preemption dispute. These issues entail the extent to which CSX Corporation is subject to the Mississippi court's jurisdiction.

(1) Nothing in this section [20106] shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party ---

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section.

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring after January 18, 2002.

On June 19, 2017, the Texas federal court issued an interlocutory Order (“Texas Court Order”) that denied the motions to remand that case back to state court (Appendix E). The Texas Court Order was based entirely on the judge’s conclusion that all the state law tort claims asserted in the complaint were completely preempted by section §10501(b). The order did not reference §20106(b), provide any analysis of the interplay between §10501(b) and the 2007 amendment to §20106, or offer any explanation as to why the state law claims were not preserved by this statute. The Texas Court Order’s sweeping finding of complete preemption of *all* of the asserted tort claims is an unusually broad application of the applicable principles that appears to stand alone among railroad accident cases.

The Texas Court Order also directed the plaintiffs to respond to CSXT’s motion to dismiss for lack of jurisdiction in the *Voight* case within 20 days of the Order. However, instead of responding to the motion, all the plaintiffs in that case responded to the Texas Court Order by non-

suiting or dismissing their claims against CSXT. This action resulted in there being no claims that are currently pending against CSXT in the *Voight* case.³

On July 19, 2017, CSXT moved to supplement the record in the *Waneck* case with the Texas Court Order, arguing it constituted newly-issued authority that “may be helpful to the Court in this matter.” Petitioners and CSXT’s co-defendants did not oppose CSXT’s motion to supplement, but responded that the Texas Court Order is not helpful to the Mississippi federal court because of its failure to address 49 U.S.C. §20106(b) and its effect on state tort law claims. On September 8, 2017, the Mississippi federal court granted CSXT’s motion to supplement, and the motion to dismiss remains pending before the court in the *Waneck* case.

II. ARGUMENT AND REQUEST FOR DECLARATORY RELIEF

Under 5 U.S.C. §554(e) and 49 U.S.C. §721, the Board has discretion to grant a request for a declaratory order to terminate a controversy or remove uncertainty in a court case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine whether to issue a declaratory order. FD No. 34662, *CSX Transportation, Inc. – Petition for Declaratory Order* (Served March 14, 2005) (“CSXT”), at 5.

In this instance, there exists a significant controversy over whether the state tort law claims of the Petitioners are preempted by 49 U.S.C. §10501(b), or whether they may proceed to be heard in state court pursuant to 49 U.S.C. §20106(b). The Board’s participation in this matter is essential in view of (1) the existence of Board precedent that is directly contrary to the conclusion reached by the Texas federal court in its June 19, 2017 Order - precedent that CSXT failed to bring to that

³ On October 25, 2017, the Texas federal court issued an order remanding the state law claims against the remaining defendants (*i.e.*, the tour bus operators) to the state court for disposition. Some or all of the plaintiffs in the *Voight* case may renew their tort claim actions against CSXT in the near future, so the issues presented by this Petition are relevant to all of the individuals listed in Appendix A and their relatives who have potential claims against CSXT.

court's attention; (2) the uncertainty injected into the *Waneck* case by CSXT's insertion of the Texas Court Order into the record of that case; and (3) the relative lack of decisions by the Board subsequent to the enactment of the 2007 amendment to 49 U.S.C. §20106(b) addressing the interplay between that provision and §10501(b). Thus, there is a real and pressing need for the Board to provide the Petitioners and the Mississippi federal court guidance on the appropriate interplay between 49 U.S.C. §10501(b) and §20106(b).

The fact that the claims against CSXT remain pending before the Mississippi federal court in the *Waneck* case do not make the Board's issuance of the requested declaratory order inappropriate "particularly if it might assist the court." *CSXT* at 6. In cases such as this one, where the court has not formally referred this issue to the STB to decide or provide guidance on the issue under the doctrine of primary jurisdiction, the Board can nevertheless "assist the court by summarizing existing law with regard to the section 10501(b) preemption without expressing a view on the application of the law to that case." FD No. 34662, *CSX Transportation, Inc. – Petition for Declaratory Order*, (Decision served May 3, 2005 ("*CSXT II*") at 8. Petitioners believe the STB should exercise its discretion to provide such guidance in this instance.

A. The Interplay Between §10501(b) Preemption and FRSA Preemption

The Board has only been called on a few times to examine the interplay between the broad preemptive authority granted by §10501(b) and the more focused preemption provisions of the FRSA. In those instances, the Board has recognized that the comprehensive scheme regulating transportation creates some overlap between it and other agencies that place limits on the scope of §10501(b). As the Board observed in *CSXT*,

The Federal Railroad Administration (FRA) has primary responsibility pursuant to the Federal Rail Safety Act (FRSA) . . . for matters involving the safety of railroad operations, regulates railroad operations, including train speed, track and road bed conditions, signal systems, brake system standards, hours of service requirements for railroad employees, operating practices, and drug and alcohol testing for

railroad employees. See 49 CFR Parts 200-268. FRA has also promulgated comprehensive track safety standards, which prescribe among other things, maintenance and inspection requirements and maximum speeds for track, and can restrict, where necessary for safety, the movement of hazardous materials.

CSXT at 3.

The Board has thus recognized that the FRA has primary responsibility for issues relating to rail safety, notwithstanding the fact that “a literal reading of §10501(b) might suggest that it preempts other federal law.” *Id.* at 9. Accordingly, neither the Board nor the courts have ever interpreted §10501(b) so broadly as to ignore complementary federal statutes, and instead “have harmonized section 10501(b) with federal statutes, including FRSA.” *Id.*, citing *Tyrrell v. Norfolk S. Ry*, 248 F.3d 517, 523 (6th Cir. 2001) (“*Tyrrell*”).

Following this approach in decisions that predate the 2007 amendment to §20106(b), the STB has held when the jurisdiction and responsibilities of the STB and FRA overlap, “the federal bodies coordinate and cooperate with each other as appropriate.” *Id.* at 10. This was particularly true in cases involving potential preemption. *Id.*, citing *Tyrrell*, 248 F.3d at 523 (“Both the Board and the FRA have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted.”).

The foregoing cases are instructive and clearly establish the general rule that preemption of state tort law claims under §10501(b) does not automatically lead to preemption of those claims under FRSA merely because there is overlap between the two statutory schemes. And, those cases predate the enactment of the 2007 amendment to §20106, which expressly excluded from the FRSA’s preemptive scope a broad range of state tort law claims against railroads. Since the passage of that amendment, the STB has directly addressed the interplay of §10501(b) and §20106(b) in only one case, Docket No. FD 35792, *Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs*

Revocable Trust and Individually – Petition for Declaratory Order (served October 29, 2014) (“*Tubbs*”). In *Tubbs*, plaintiffs filed a lawsuit in Missouri state court for flooding and property damages allegedly caused by the improper design, construction and maintenance of a line of rail owned and operated by BNSF Railway (“BNSF”). More specifically, in preparation for anticipated flooding, BNSF raised its embankment and accompanying mainline track and placed rock, rip-rap and other material track side. *Id.* at 2. These actions resulted in the Tubbses’ adjacent farm property being flooded and damaged. Included among the plaintiffs’ claims was an allegation that BNSF was liable for negligence in part due to its violations of the FRA’s regulations governing drainage under railroad tracks, promulgated at 49 CFR §213.33 and §213.103(c). *Id.* at 7.

In the course of that state court litigation, the petitioners were granted a stay by the state court for the purpose of asking the Board whether their claims were preempted by §10501(b). *Id.* at 1. The petitioners specifically asked the Board for a declaratory ruling that their “FRSA-based claims” were not preempted by §10501(b). *Id.* at 7, note 12. In response, the Board first affirmed its previously stated rule that “where there are two overlapping statutes, the Board attempts to harmonize the two statutes, with each statute given effect to the extent possible. *Id.*, citing *CSXT and Tyrrell*, *supra*. The Board further stated,

[h]ere, the FRSA regulations that Petitioners cite are applicable to the entire national rail system and do not directly conflict with the uniform federal regulation of railroads under the Interstate Commerce Act. Accordingly, §10501(b) does not preempt the FRA regulations on drainage under railroad tracks. Petitioners’ tort claims based on alleged violations by BNSF of these regulations are therefore also not preempted by §10501(b).

Id. Nonetheless, the Board did find that the Tubbses’ state tort claims based on BNSF’s design, construction, and maintenance (its preparation for the anticipated flooding) were preempted. The Tubbses appealed the Board’s finding of preemption of their state negligence law claims to the Court of Appeals for the Eighth Circuit. That court affirmed the STB, basing its denial of the

appeal in part due to the Court's recognition that the Tubbses' state tort law claims that BNSF was liable under the FRSA had been preserved by the STB's holding. *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1145 (8th Cir. 2015).

The Board later confirmed its approach in *Tubbs* in *dicta* included in FD No. 35832, *CSX Transportation Inc. – Petition for Declaratory Order*, (Decision served July 31, 2015) at 4, stating that in *Tubbs*, “state law claims regarding the design and construction of a rail line were preempted, but not those claims based upon nationwide standards in the Federal Railroad Safety Act.”

B. Other State Law Court Actions Falling within §20106(b) are Also Not Preempted by §10501(b)

The STB held in *Tubbs* that tort claims raised in state court based on alleged violations of FRA regulations are not preempted by §10501(b). This is consistent with §20106(b)(1)(A), which explicitly states that the FRSA does not preempt state tort law actions alleging damages caused by a railroad's failure “to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters).” Petitioners ask the Board to confirm in response to this Petition that this rule should be applied by the Mississippi court in the *Waneck* case. Petitioners also ask the Board to provide confirmation that state court cases involving claims alleging damages caused by a railroad's failure to comply with the other categories of actions set out in §20106(b) are also not completely preempted by §10501(b), so that those allegations may be considered and decided by the state court in which they are brought. Such categories include actions under state law seeking damages for personal injury, death, or property damage alleging that a railroad failed to comply with a Federal standard of care established by an order of the Secretary of Transportation or the Secretary of Homeland Security. They also include actions alleging noncompliance with the railroad's own plan, rule or standard that it created pursuant to a regulation or order issued by either of the Secretaries.

In the *Waneck* case, the plaintiffs' numerous allegations include claims that CSXT's engineer violated a federal standard of care in failing to stop the train in a reasonable amount of time, failing to slow or stop for a specific, individual hazard and an essentially local safety hazard, which was the motorist high-centered on the crossing. The complaint also specifically alleges that CSXT failed to properly inspect and maintain this crossing which allowed maintenance activities at the crossing to alter the vertical alignment of the crossing in its approaches in violation of CSXT's own standards and industry guidelines such as the American Association of State Highway and Transportation Officials ("AASHTO") and the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). These improper maintenance activities created a severe incline or "hump" at this crossing and rendered it unsafe for motorists, especially for automobiles and buses that can become high-centered and stuck on the crossing, thus rendering the crossing extra-hazardous, ultra-hazardous, and unusually dangerous. These allegations are in addition to the claims that CSXT's negligence was the result of its failure to comply with regulations codified by the FRA.

A railroad defendant could be expected to argue that a particular state tort action falls outside the scope of §20106(b) and is therefore preempted by the FRSA. The Board should clarify that – based upon the legislative history of the 2007 amendment to §20106(b), and the courts' interpretation of this statute – such challenges do not lead to complete preemption by §10501(b), but are rather within the province of the state court to review and consider, after the development of the factual and legal basis for such claims.

1. Legislative History

The 2007 amendment to §20106 was enacted for the express purpose of correcting the harsh result produced by courts' interpretation of the prior version of that section to essentially prohibit individuals injured or killed by railroad negligence to obtain any relief under state tort

laws. The decisions adopting this position were issued in response to lawsuits filed in the aftermath of a freight train derailment in Minot, North Dakota on January 18, 2002 that resulted in “the release of more than 220,000 gallons of anhydrous ammonia into the air, exposing the area’s population to a cloud of toxic gas, causing many people to suffer from permanent respiratory disease and eye damage.” *Lundeen v. Canadian Pacific Railway, et al.*, 532 F.3d 682, 687 (5th Cir. 2008). All the ensuing lawsuits filed in Minnesota and North Dakota against Canadian Pacific Railway seeking damages under state negligence and tort laws were dismissed based on a finding that they were completely preempted by §20106. *Id.*

The Minot tragedy and the dismissal of the state law cases resulted in the 2007 amendment to §20106, which was passed expressly to “clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent.” Conf. Rep. to Accompany H.R. 1, H. Rep. 110-259 (July 25, 2007) at 351. Accordingly, the 2007 amendment “provides further clarification of the intention of 49 U.S.C. 20106, as it was enacted in the [FRSA]] to explain that State law causes of action for personal injury, death or property damage are not preempted.” As the 8th Circuit later recognized in *Lundeen, supra*, when overruling its prior decisions upholding dismissal of the state claims on FRSA preemption grounds, “[t]he purpose of the amendment is to give railroad accident victims the right to seek recovery in state courts when they allege railroads violate safety standards imposed by a railroad’s own rules, certain state laws, or federal regulations.” 532 F.3d at 690. “[T]he statute’s clear language indicates state law causes of action are no longer preempted by §20106.” *Id.* at 689.

The clear intent of the 2007 amendment to §20106(b) was therefore to clarify that state law causes of action for a railroad’s failure to comply with the categories of federal rail safety

regulations, standards of care, and railroad plans, practices or standards developed pursuant to those rules were not completely preempted by the FRSA or by §10501(b). *See Henning v. Union Pacific Railroad Co.*, 530 F.3d 1206, 1215 (10th Cir. 2008) (in passing the 2007 amendment Congress made “it clear that when a party alleges a railway *failed to comply* with a federal standard of care established by regulation or with its own plan, rule or standard created pursuant to a federal regulation, preemption will not apply”) (emphasis in original). Thus, “even when a regulation covers the subject matter of a claim, the claim can avoid preemption if the railroad violated a federal standard of care or its internal rule.” *Zimmerman v. Norfolk S. Ry. Corp.*, 706 F.3d 170, 178 (3d Cir. 2013).

As such, an interpretation of §10501(b) to automatically preempt state negligence claims other than those based solely on a violation of FRA regulations would be contrary to the clear intent of the 2007 legislation. *See also*, 49 U.S.C. §20106(b)(1)(C) (which preserves state tort actions where a railroad has allegedly failed to comply with a state law, regulation, or order that is not incompatible with subsection (a)(2) (a federal scheme covering the subject matter of a state law, regulation or order related to railroad safety or security)).

2. FRSA Preemption is Now an Affirmative Defense

Courts interpreting §20106(b) post-2007 Amendment have confirmed that the FRSA no longer completely and automatically preempts state law claims arising out of allegations of a railroad’s failure to comply with FRA regulations and the other categories of §20106(b). Rather, whether preemption of a state tort law claim is appropriate is an affirmative defense that can be raised and proved by the defendant based on factual record developed before the state court. *See, Bates v. Missouri & Northern Arkansas Railroad Co.*, 548 F.3d 634, 637 (8th Cir. 2008) (“arguments for complete preemption under the FRSA have been foreclosed by the 2007 amendment” but “preemption as an affirmative defense” is still available). In *Bates*, the 8th

Circuit determined that, “[a]bsent diversity, therefore, a state court is the proper forum for litigating [the defendant railroad’s] preemption defense.” *Id.* at 637. *See also, Joyce v. Union Pacific RR Co.*, 2009 WL 3248213 (U.S. Dist. Court E.D. Mo. 2009) (“Defendant, however, can raise the affirmative defense of [FRSA] preemption at the State trial court that has jurisdiction over this matter.”).⁴

In view of the confusion caused by the Texas Court Order refusing to remand that litigation back to the Texas state court, and the inclusion of that order into the record of the *Waneck* case, it is necessary for the STB to clearly state that section §10105(b) does not completely preempt state court claims that allege violations that fall within the provisions of §20106(b). Importantly, in many state tort law cases, as in the two primary cases at issue here, there has been no discovery at this early stage (*i.e.*, the motion to dismiss stage) of the litigation. As FRSA preemption is now an affirmative defense that must be raised in the court and determined on a factual record, the

⁴ It is worth noting that the *Bates* court stated, in response to the railroad defendant’s argument that the state tort claim was preempted due to the presence of a regulatory scheme governing locomotives, “Bates does not allege that [the railroad’s] locomotive equipment was inadequate; rather, he asserts that its employees failed to operate the equipment with necessary care.” 548 F.3d at 638. Similarly, in *Illinois Central Railroad Co. v. Cryogenic Transp., Inc.*, 901 F. Supp. 2d 790 (S.D. Miss. 2012) (“*Cryogenic*”) a case involving the collision of a train and a tanker truck at a railroad crossing, the court determined that a tort claim based on train speed was preempted, since the FRA determines the speed limits for trains and the train in issue was operating under that limit. However, the court also stated that “[t]he ICRR train engineer, however, had a duty to respond appropriately to avoid a collision with the tanker-truck sitting on the mainline tracks. This duty does not impose a specific limit on the train’s operating speed, but rests on factual issues to be decided by a jury as to whether the train engineer’s efforts to avoid the collision were sufficient.” Thus, whether the engineer failed to comply with a federal duty of care to avoid a collision with a truck on the rail crossing was not preempted by the FRSA, and could be the subject of a state court case. *Id.* at 804.

Board should make it clear that its §10501(b) preemptive authority is not properly used to cut off this process for well-plead claims raised in a state court complaint.⁵

III. CONCLUSION

Based on all of the foregoing, the Petitioners submit that there is good cause for the Board to exercise its discretion and issue a declaratory order that resolves the current uncertainty in the litigation summarized in this Petition. This uncertainty has been fostered by CSXT supplementing the record in the *Waneck* case with the Texas Court Order with the obvious intent of obfuscating the issues and legal principals before the court in the hopes that it will dismiss the plaintiff's claims. The failure of the Board to provide needed guidance to the court will therefore compound the confusion and uncertainty between the courts on where the Petitioners' claims should be heard. Specifically, the Petitioners seek an order declaring:

1. That §10501(b) does not necessarily preempt claims under state tort laws based on claims that a railroad violated any of the factors set forth in 49 U.S.C. §20106(b); and
2. That to the extent state tort law claims are raised, the proper forum for determining whether the claims are actionable or are preempted by the FRSA is the court in which they are raised.

If the Board decides in its discretion to decline to issue a declaratory order, the Petitioners ask that the decision denying the Petition nevertheless provide guidance to the parties and to the courts that are presently adjudicating this matter.

⁵ Also at issue in the pending court cases is the applicability of precedent holding that simple negligence claims associated with railroad crossing accidents are not preempted by 49 U.S.C. §10501(b), either completely or impliedly. See e.g., *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011); In *Anderson v. Union P. Ry. Co.*, No. 10-cv-193, 2011 U.S. Dist. LEXIS 108076 (M.D. La. 2011); *Rawls v. Union P. Ry. Co.*, No. 1:09-cv-01037, 2012 U.S. Dist. LEXIS 94972 at *15 (W.D. Ark. 2012). These principles are not part of the instant Petition, which is focused on obtaining Board guidance on the interplay between §10501(b) and §20106(b).

Respectfully submitted,



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Attorneys for the Petitioners

Dated: March 5, 2018

APPENDIX A

PETITIONERS

<u>Last Name</u>	<u>First Name</u>	<u>Category</u>
Bartsch	Donna	Bus Victim
Chapman	Kimberly Kay	Estate of Kenneth Hoffman
Cox	Linda	Bus Victim
Cruz	Louisa	Bus Victim
Cruz	Juanita	Bus Victim
Dailey	Helen	Bus Victim
DeLaCruz	Santiago	Bus Victim
DeLaCruz	Mary	Bus Victim
DuBois	Mollie	Bus Victim
Fite	Frances "Skip"	Bus Victim
Frank	Gladys Jane	Bus Victim
Gaskamp	Eugene	Bus Victim
Gaskamp	Janie	Bus Victim
Hall	Mary	Bus Victim
Hanna	Darwyn	Bus Victim
Hanna	Marie	Bus Victim
Harvan	Clinton Louis	Bus Victim, Deceased
Havran	Annie May	Estate of Clint Harvan
Havran	Annie May	Bus Victim
Hoffman	Peggy	Bus Victim, Deceased
Hoffman	William	Estate of Kenneth Hoffman
Hoffman	Kenneth	Bus Victim, Deceased
Hoffman	Joyce	Bus Victim
Kahanek	Betty	Bus Victim
Keathley	Charles	Bus Victim
Keathley	Mary Ellen	Bus Victim
Kieke	Kay	Bus Victim
Kile	Yvonne	Bus Victim
King	Debra	Bus Victim
Landrum	Aubrey	Bus Victim
Landrum	Karen	Bus Victim
Lucas	Mary	Bus Victim
Luttrell	Shaderic	Bus Victim
Luttrell	Velma	Bus Victim
Martinez	Rachel	Bus Victim
McCan	Jill	Bus Victim

McKervey	Duane	Bus Victim
McKervey	Kim	Bus Victim
Medina	Gloria	Bus Victim
Messler	Melissa	Estate of Kenneth Hoffman
Milberger	Dorothy	Bus Victim
Nokes	Sharon	Bus Victim
Nygren	Justine	Bus Victim
Orr	Tim	Individually and Estate of Deborah Orr
Orr	Deborah	Bus Victim, Deceased
Rabel	JC	Bus Victim
Rabel	Betty	Bus Victim
Ramirez	Mary	Bus Victim
Schell	Leslie	Estate of Deborah Orr
Sheets	Catherine	Estate of Deborah Orr
Sheets	Charles	Estate of Deborah Orr
Smith	Lisa	Bus Victim
Torres	Priscilla	Bus Victim
Turner	Mike	Bus Victim
Turner	Catherine	Bus Victim
Viot	Evelyn	Bus Victim
Voigt	Dee	Estate of Peggy Hoffman
Waneck	Starr	Bus Victim
Waneck	Jimmy	Individually
Webb	Karen	Bus Victim

APPENDIX B



PRELIMINARY REPORT

HIGHWAY

HWY17MH010

The information in this report is preliminary and will be supplemented or corrected during the course of the investigation.

About 2:12 p.m. (local time) on Tuesday, March 7, 2017, a 2016 Van Hool motorcoach, operated by Echo Transportation and occupied by a 60-year-old driver and 49 passengers was traveling northbound on Main Street in Biloxi, Harrison County, Mississippi. The motorcoach approached and stopped in advance of a high vertical profile (humped) highway-railroad grade crossing. As shown in figure 1, the crossing was marked with 1) a crossbuck sign, 2) warning lights, 3) a gate, and 4) a low ground clearance grade crossing warning sign with a low ground clearance plaque. As the motorcoach attempted to traverse the crossing, its frame became lodged on the tracks. The driver attempted to free the motorcoach by trying to move the vehicle backward and forward. At the same time, an eastbound freight train operated by CSX Transportation—composed of three locomotives, 27 loaded cars, and 25 empty cars—was approaching the crossing at a recorded speed of 26 mph. Upon seeing the approaching train the motorcoach driver opened the entry door and told the passengers to evacuate. The train engineer sounded the train horn and put the train into emergency braking about 510 feet west of the crossing. The train had decelerated to about 19 mph when it struck the left side of the motorcoach, pushing it about 203 feet before coming to a stop with the motorcoach still engaged to the lead locomotive (see figure 2).



Figure 1. Northbound view of the highway rail grade crossing at the crash site.

As a result of the crash, four passengers died, 39 passengers sustained serious to minor injuries and six passengers were uninjured. The motorcoach driver suffered serious injuries and the train engineer was uninjured.

The passengers were on a multi-day casino tour that originated in Bastrop, Texas. They were staying at a casino in Bay St. Louis, Mississippi, from which they planned visits to other casinos in the area including Biloxi and New Orleans, Louisiana. The crash occurred when the motorcoach was traveling from Bay St. Louis to a casino in Biloxi, MS. The tour's normal trip routing followed a route along Interstate 10. On the day of the crash, the tour operator changed to a more scenic route along the coast, an alternate route that had been used in previous trips.

The preliminary result from the motorcoach driver's toxicology test was negative for alcohol and other drugs. The train crew was not tested nor were they required to be tested.

NTSB investigators along with personnel from the Biloxi Police Department documented the mechanical condition of the motorcoach, the crash location, and the physical characteristics of the crossing. The track and operational characteristics of the crossing signals were also examined and documented. NTSB investigators continue to examine issues related to the railroad grade crossing signage and maintenance, as well as the crashworthiness of the motorcoach. Investigators are also following up with additional passenger and witness interviews, and gathering factual information related to motor carrier operations, driver and train crew experience, hours of service, and trip routing.



Figure 1. Motorcoach and train at final rest Source: Biloxi PD

APPENDIX C

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

**STARR SWEARINGEN WANECK; and)
JIMMY LEE WANECK)**

Plaintiff,)

v.)

**CSX CORPORATION; CSX)
TRANSPORTATION INC.; ECHO)
TRANSPORTATION SOLUTIONS, LLC;)
TBL GROUP, INC.; DIAMOND TOURS INC.)
LOUIS AMBROSE, JR.; and A, B, and C, being)
those unknown individuals, partnerships,)
corporations, or other entities whether singular or)
plural whose negligence caused or contributed to)
the accident made the basis of this suit)**

Defendants.)

CASE NO. A2402 17 30

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

COME NOW, Plaintiffs, Starr Waneck and Jimmy Lee Waneck, by and through their attorneys, bring this First Amended Complaint, and for such cause of action would respectfully show as follows:

I. PARTIES

PLAINTIFFS

1. Plaintiff Starr Swearingen Waneck, is an individual and resident of the State of Texas. Starr Swearingen Waneck was a passenger on the Charter Bus involved

in this Collision and the wife of Jimmy Lee Waneck.

2. Plaintiff Jimmy Lee Waneck, is an individual and resident of the State of Texas. Jimmy Lee Waneck is the husband of Starr Swearingen Waneck

3. All the above identified Plaintiffs will hereinafter be referred to collectively as "Plaintiffs" throughout the remainder of this document. Each reference to "Plaintiffs" or allegation by "Plaintiffs" shall include each of the above Plaintiffs as if each Plaintiff was individually referenced or each allegation was made by each Plaintiff.

DEFENDANTS

4. Defendant CSX Corporation is a for-profit Virginia corporation duly organized and existing under the laws of the State of Virginia, with its principal place of business in the State of Florida. Defendant CSX Corporation can be served with process through its registered agent: C.T. Corporation System, 4701 Cox Rd., Suite 285, Glen Allen, Virginia 23060.

5. Defendant CSX Transportation Inc. is a railroad subsidiary of Defendant CSX Corporation and is for-profit Virginia corporation duly organized and existing under the laws of the State of Virginia, and doing substantial business in Harrison County, Mississippi. CSX Transportation Inc. can be served with process through its registered agent: C.T. Corporation System, 645 Lakeland East Drive Ste. 101, Flowood, Mississippi 39232.

6. CSX Corporation and CSX Transportation, Inc. (hereinafter collectively referred to as "CSX" or "Defendant Railroad"), by and through their railroad interests, own railroad tracks and conducts business in Harrison County, Mississippi by dispatching

trains into and through Harrison County, Mississippi. The train and railroad-highway grade crossing where the collision that is subject to this litigation occurred is owned by CSX.

7. At all times pertinent hereto, all employees of CSX were acting in their individual capacity and also as agents of CSX, within the scope of their employment and authority, and in the furtherance of the business of CSX. All the acts and omissions of the employees of CSX are imputed to their employer, who is liable for such acts and omissions, as well as rendering the individual Defendant liable in their individual capacities.

8. Defendant Echo Transportation Solutions, LLC is a for-profit Texas corporation duly organized and existing under the laws of the State of Texas, and doing substantial business in Harrison County, Mississippi. Defendant Echo Transportation Solutions, LLC can be served with process through its registered agent: Elisa C. Fox, Decker Jones, 801 Cherry Street, Suite 2000, Ft. Worth, Texas 76102.

9. Defendant TBL Group, Inc. is a for-profit Texas corporation duly organized and existing under the laws of the State of Texas, and doing substantial business in Harrison County, Mississippi. Defendant TBL Group, Inc. is the parent company to Echo Transportation Solutions, LLC (hereinafter collectively referred to as "Echo") and can be served with process through its registered agent: Elisa C. Fox, 801 Cherry Street, Suite 2000, Ft. Worth, Texas 76102.

10. Defendant Louis Ambrose Jr., is an individual and resident of the State of Texas. Louis Ambrose Jr. was the driver of the Charter Bus involved in the collision

giving rise to this litigation. Louis Ambrose Jr. is also employed by Echo Transportation Solutions, LLC.

11. Defendant Diamond Tours Inc. (hereinafter "Diamond") is a for-profit Florida corporation with its principal place of business in Fort Meyers, Florida. Diamond can be served with process through its registered agent: E. Murray Moore Jr., 215 S. Monroe Street, Suite 200, Tallahassee, Florida 32302.

12. The Fictitious Defendants A, B, and C, are those unknown individuals, partnerships, corporations, or other entities whether singular or plural whose negligence caused the accident made the basis of this lawsuit.

II. JURISDICTION AND VENUE

13. The Collision giving rise to this litigation occurred in Harrison County, Mississippi.

14. This Court has jurisdiction over this matter as a court of original jurisdiction in the State of Mississippi for personal injury matters such as what is pleaded herein.

15. Venue is proper in the Circuit Court for Harrison County, Mississippi.

16. Pursuant to 49 U.S.C. § 20106, this case was appropriately brought in state court rather than federal court. Plaintiffs reserve the right to amend this Petition as needed to further establish why this case was appropriately brought in the Circuit Court of Harrison County, Mississippi. All allegations herein related to Defendant Railroad are based upon and should be interpreted to state causes of action seeking damages under state law for personal injury or property damage, based upon one or more of the

following:

- a. Defendant Railroad has failed to comply with the Federal standard of care established by a regulations or orders issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of 49 U.S.C. § 20106;
- b. Defendant Railroad has failed to comply with its own plans, rules, or standards that defendant railroad created pursuant to a regulation or order issued by either of the Secretaries; or
- c. Defendant Railroad has failed to comply with State laws, regulations, and orders that are not incompatible with subsection (a)(2) of 49 U.S.C. § 20106.

17. All allegations set forth in this Complaint are based upon information and belief.

18. All allegations set forth in each of the paragraphs in this Complaint are incorporated by reference into each of the other sections and paragraphs contained in this Complaint, as if fully set forth therein.

III. FACTS AND ALLEGATIONS

19. On Wednesday, March 7, 2017, Plaintiff Starr Swearingen Waneck was riding as a passenger on a Charter Bus that was traveling from Austin, Texas, through Harrison County, Mississippi (hereinafter "Charter Bus"). The Charter Bus was transporting passengers to several casinos in the southern Mississippi and Louisiana region.

20. All occupants of the vehicle were paying customers and enroute to the Boomtown Casino in Biloxi, Mississippi. The trip was planned by Diamond. During the trip, the Charter Bus was traveling north on Main Street in Biloxi, Mississippi.

21. The Charter Bus is owned and operated by Echo Transportation Solutions LLC, a subsidiary of the TBL Group, Inc. and was being driven by Louis Ambrose Jr., an employee of Echo.

22. Main Street is a public two-lane asphalt road running generally in a north-south direction. Main Street is intersected by CSX railroad tracks running east-west just north of the Main Street and Esters Boulevard South intersection and just south of the Main Street and Esters Boulevard North intersection.

23. As the Charter Bus was traveling north on Main Street in Biloxi, Mississippi it encountered the CSX railroad-highway grade crossing, identified as U.S. DOT # 340185W (hereinafter "Main Street Crossing" or "this crossing").

24. The Main Street Crossing is a dangerous and severely inclined or "humped" crossing. The Main Street Crossing consists of several layers of asphalt patches. These asphalt patches create a steep inclined or hump. This hump has been created and gradually grown overtime by automated CSX railroad maintenance practices.

25. Prior to March 7, 2017, there have been sixteen accidents at this crossing. Several of those prior accidents have involved motorists either stuck or stopped on the Main Street Crossing. In the most recent accident at this crossing, just months prior to this accident, a CSX train hit a Pepsi truck that became lodged on the Main Street Crossing.

26. As the Charter Bus began to traverse the crossing, it became high-centered and lodged on the Main Street Crossing. Louis Ambrose Jr. was unable to dislodge the Charter Bus from the Main Street Crossing.

27. After several minutes of being stuck on the crossing, passengers began to evacuate the Charter Bus.

28. At about the same time, a CSX freight train (hereinafter "Accident Train") was traveling in a generally eastbound direction and barreling down on the Main Street Crossing. Despite straight railroad tracks for over 5 miles on approach to the Main Street Crossing, the CSX train crew failed to apply the brakes or put the train into emergency until the train was approximately 500 feet from the intersection.

29. As a result, the CSX train failed to stop prior to the crossing, violently colliding with the Charter Bus (hereinafter the "Collision").

30. The Collision caused numerous fatalities and life-altering injuries to passengers on the Charter Bus, including Plaintiff, Starr Swearingen Waneck.

COUNT ONE
GENERAL LIABILITY ISSUES COMMON TO ALL DEFENDANTS

31. Plaintiffs, restate and reallege each and every other paragraph (and subparagraph) of this Complaint, including those paragraphs appearing above and below, and by this reference incorporate the same as though fully set forth herein.

32. Defendants have a duty to exercise reasonable care to avoid injuring or killing members of the public. In this case Defendants breached their duty by failing to exercise reasonable care.

33. As a direct and proximate result of the Defendants' breach of this duty, Plaintiffs suffered damages, as alleged herein. All acts or omissions of Defendants constitute negligence, gross negligence, negligence *per se*, willful and wanton conduct,

recklessness, intentional conduct, and demonstrate a reckless and intentional disregard for the safety of the traveling public.

WHEREFORE, Plaintiffs demand judgment against Defendants for a just and adequate amount of damages plus costs.

COUNT TWO
NEGLIGENCE AND GROSS NEGLIGENCE OF CSX

34. Plaintiffs, restate and reallege each and every other paragraph (and subparagraph) of this Complaint, including those paragraphs appearing above and below, and by this reference incorporate the same as though fully set forth herein.

TRAIN OPERATIONS

35. CSX had a duty to operate the train at a speed for the then existing conditions and be prepared to slow or stop for any hazardous conditions.

36. The Collision described in this Complaint is a direct and proximate result of the negligence and/or gross negligence of Defendant Railroad in the following respects, namely:

- a) Failing to keep a proper lookout prior to the Collision;
- b) Failing to take reasonable precautions to protect the Main Street Crossing before the train fully occupied the crossing;
- c) Failing to travel at a speed that allowed the train to stop in time to avoid the Collision;
- d) Failing to slow or stop the train to avoid "a specific, individual hazard" at the Main Street Crossing prior to the Collision and/or failing to approach the Main Street Crossing prepared to stop due to "an essentially local safety hazard;"
- e) Failing to instruct its train crews on the appropriate circumstances under which they should be prepared to brake, slow, or stop the train for safety hazards at

railroad crossings;

- f) Failing to be prepared to brake, slow, or stop for motorists at the Main Street Crossing.

37. Plaintiffs are not making any claim for excessive speed based on "a specific individual hazard" or "an essentially local safety hazard." The claims based on "a specific individual hazard" and "an essentially local safety hazard" should not be interpreted as anything but the failure to, or the failure to be prepared to, slow the train, apply the brakes, or stop the train.

38. Defendant Railroad has also condoned its employees' failure to modify train operations to account for hazards at railroad crossings and has adopted a routine practice of ignoring hazards to the motoring public. This intentional indifference to the safety of Plaintiff and the motoring public was one of the contributing factors that caused this Collision.

FAILURE TO INSPECT AND REPAIR UNSAFE CROSSING

39. Regulations specify many duties Defendant Railroad has in connection with the crossing, track and surrounding appurtenances. Those duties include, but are not limited to, the following:

- a) The duty to inspect the crossing, track and surrounding appurtenances pursuant to 49 C.F.R. §§ 213.233, 213.237, 213.233 and associated sections;
- b) The duty to designate qualified persons to inspect track for defects pursuant to 49 C.F.R. § 213.7(b);
- c) The duty to immediately prepare and maintain a record of each inspection of its track to specify the track inspected, date of inspection, location and nature of any defects and identifying the appropriate remedial for such defects all pursuant to 49 C.F.R. § 213.241 and its own rules;

- d) The duty to immediately bring its track into compliance with track safety standards or halt operations over that track pursuant to 49 C.F.R. § 213.5.

40. The Collision described in this Complaint is a direct and proximate result of the negligence and/or gross negligence of Defendant Railroad in the following respects, namely:

- a) Failing to properly inspect, maintain and repair the Main Street Crossing;
- b) Failing to properly identify, document, report, or repair the hazardous track and crossing conditions described herein;
- c) In routinely ignoring the hazardous conditions posed by the Main Street Crossing;
- d) Allowing these hazardous conditions to exist in direct violations of the code of Federal Regulations and Defendant Railroad's rules created pursuant to such regulations.

41. The hazardous track and crossing conditions described herein were not properly identified, documented, reported or repaired by Defendant Railroad and its employees. Instead these hazardous conditions were allowed to exist as a direct violation of the Code of Federal Regulations and CSX's own rules created pursuant to such regulations. Defendant Railroad knew or should have known that the existence of these hazardous conditions created an unsafe crossing in violation of these rules and regulations.

42. Many factors have combined to render this crossing unsafe for motorists. This combination of track conditions required remedial action to allow for safe operations over this crossing by motorists and railroad traffic. If Defendant Railroad would have properly conducted track inspections at this crossing, the hazardous conditions at this

crossing would have been identified and remedial action taken long before this accident, thereby preventing this collision.

UNSAFE CROSSING CONDITIONS

43. The Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad, which allowed maintenance activities at the Main Street Crossing to alter the vertical alignment of the crossing and its approaches, thereby creating a severe incline or "hump."

44. CSX maintenance activities at the Main Street Crossing should not be allowed to build up the crossing surface above the same level plane of the intersecting roadway, thereby creating an unacceptable approach grade. The both approaches to the Subject Crossing were at an inappropriate incline to the crossing surface. This inappropriate incline violated standards of the American Association of State Highway and Transportation Officials ("AASHTO") and the American Railway Engineering and Maintenance-of-Way Association ("AREMA").

45. The humped condition rendered the Main Street Crossing unsafe for motorists and extra-hazardous, ultra-hazardous, and unusually dangerous.

46. The unsafe crossing conditions described herein were not properly identified, documented, reported nor repaired by CSX. Instead these hazardous conditions were allowed to exist as a direct violation of State law, the code of Federal Regulations and the railroad's own rules. CSX knew or should have known that the existence of these hazardous conditions created an unsafe crossing in violation these laws, rules and regulations.

47. CSX knew, or should have known, that the unsafe crossing conditions described herein created a specific local hazard that should have been repaired, guarded against or warned about. CSX did not notify the train crew on the subject train of any specific local hazard regarding the Main Street Crossing. The train crew did not slow and or brake in sufficient time to avoid the collision or meaningfully change the dynamic of the Collision. They did not know to approach the Main Street Crossing prepared to brake.

48. If CSX would have properly conducted track inspections at this crossing, the hazardous conditions at the Main Street Crossing would have been identified and remedied long before this Collision, thereby preventing this Collision.

49. Although there are many problems that are caused by the complex crossing characteristics of this crossing, Plaintiffs are not making any claim based upon anything inappropriate concerning the design or construction of the railroad track. These allegations assert that this crossing was not properly maintained and should not be interpreted as anything but improper maintenance issues.

FAILURE TO REPORT UNSAFE CONDITIONS

50. CSX has a duty to inspect, report, and repair unsafe conditions at the Main Street Crossing.

51. The Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad, as follows:

- a) Failing to correct or accommodate for the hazardous characteristics and conditions at the Main Street Crossing;

- b) Condoning its employee's failure to report these unsafe crossing conditions and characteristics;
- c) Failing to require its employees to report unsafe conditions at the Main Street Crossing, in violation of Defendant Railroad's Operating Rules and federal regulations which require Defendant Railroad to instruct its employees to comply with its operating rules.
- d) Failing to properly warn the CSX train of the problems the Charter Bus was having in navigating across the Main Street Crossing;
- e) Failing to have adequate and reasonable safeguards in place for the movement of the Charter Bus over the Main Street Crossing;
- f) Failing to timely respond to calls concerning the problems the Charter Bus was having in navigating over the Main Street Crossing;
- g) Failing to properly staff its dispatch center to answer calls from the 1-800 number at the Main Street Crossing;
- h) Failing to instruct, notify, or warn the CSX train crew of the Charter Bus at the Main Street Crossing;
- i) It was otherwise careless and negligent and/or grossly negligent as such facts are discovered during discovery in this litigation.

52. Defendant Railroad has actual or constructive knowledge that the severe non-compliant hump rendered this crossing more complex and more hazardous for motorists. Instead of correcting or accommodating for these hazardous characteristic and condition, Defendant Railroad elected to ignore its existence. As a result, its employees are aware that CSX does not want them to report hazardous conditions that are known to make crossings like this unsafe. It is the routine practice of Defendant Railroad to condone its employee's failure to report these unsafe crossing characteristics and conditions. Defendant Railroad knew, or should have known, that this failure to report and address unsafe crossing characteristics and conditions, would result in unnecessary

loss of life and injuries.

53. As a direct and proximate result of the Defendants' breach of this duty, Plaintiffs suffered damages, as alleged in this Complaint. All acts or omissions of Defendants constitute negligence, gross negligence, negligence *per se*, willful and wanton conduct, recklessness, intentional conduct, and demonstrate a reckless and intentional disregard for the safety of the traveling public.

WHEREFORE, Plaintiffs demand judgment against Defendants for a just and adequate amount of actual damages, punitive damages, costs incurred herein together with prejudgment and post-judgment interest, and other relief as the Court deems just and proper.

COUNT TWO
**NEGLIGENCE AND GROSS NEGLIGENCE OF ECHO, DIAMOND,
AND LOUIS AMBROSE JR.**

54. Plaintiffs, restate and reallege each and every other paragraph (and subparagraph) of this Complaint, including those paragraphs appearing above and below, and by this reference incorporate the same as though fully set forth herein.

55. Echo, Diamond, and Louis Ambrose Jr. had a duty to exercise a high degree of care towards its passengers, including Plaintiff, Starr Swearingen Waneck.

56. The Collision described in this Complaint is a direct and proximate result of the negligence and/or gross negligence of Echo and Louis Ambrose Jr. in the following respects, namely:

- a) Failing to keep and maintain a reasonably careful and proper lookout in the Charter Bus's direction of travel;

- b) Failing to keep the Charter Bus under reasonable and proper control;
- c) Failing to timely notify CSX that the Charter Bus was stuck on the Main Street Crossing;
- d) Failing to properly plan the route for the Charter Bus, causing it to become stuck on the Main Street Crossing;
- e) Failing to abide and observe railroad signs and signals;
- f) Failing to yield the right of way to the path and direction of travel of the CSX train;
- g) Failing to operate the Charter Bus with due caution so as not to impair or restrict proper operation of the vehicle, in violation Mississippi Regulations, Miss. Code, Title 63 *et seq.*;
- h) Failing to use reasonable care to ensure that the Charter Bus could safely traverse the Main Street Crossing, in violation Mississippi Regulations, Miss. Code, Title 63 *et seq.*;
- i) Failing to ensure the Charter Bus could cross the Main Street Crossing safely without changing gears, in violation Mississippi Regulations, Miss. Code, Title 63 *et seq.*; and
- j) Approaching and entering the Main Street Crossing without first seeing and ascertaining that such movement could be made safely, in violation Mississippi Regulations, Miss. Code, Title 63 *et seq.*

57. It was otherwise careless and negligent and/or grossly negligent as such facts are discovered during discovery in this litigation.

58. As a direct and proximate result of the Defendants' breach of this duty, Plaintiffs suffered damages, as alleged in this Complaint. All acts or omissions of Defendants constitute negligence, gross negligence, negligence *per se*, willful and wanton conduct, recklessness, intentional conduct, and demonstrate a reckless and intentional disregard for the safety of the traveling public.

WHEREFORE, Plaintiffs demand judgment against Defendants for a just and adequate amount of actual damages, punitive damages, costs incurred herein together with prejudgment and post-judgment interest, and other relief as the Court deems just and proper.

COUNT THREE
INTENTIONAL DISREGARD FOR PUBLIC SAFETY TO ALL DEFENDANTS

59. Plaintiff, restates and realleges each and every other paragraph (and subparagraph) of this Complaint, including those paragraphs appearing above and below, and by this reference incorporate the same as though fully set forth herein.

60. Defendants' customs, policies and conduct in all of the aforementioned allegations were willful and wanton, and demonstrated a reckless disregard for the safety of the motoring public. Specifically, Defendant Railroad has intentionally elected to disregard legal duties owed to the traveling public.

61. Defendants have demonstrated a pattern of conduct by failing to enforce its own policies and procedures as well as federal and state laws providing for the safe operation of trains and commercial passenger vehicles. This pattern of conduct has condoned and ratified the conduct of its employees and agents to disregard duties owed to the traveling public.

62. Defendant Railroad has made a deliberate decision that it will be cheaper to pay compensatory damages for claims resulting from train collisions than to properly maintain its crossings and dispatch systems. Defendant Railroad's conduct as set forth herein constitutes malice.

63. As a direct and proximate result of the Defendants' willful and wanton breach of this duty, Plaintiffs suffered damages, as alleged in this Complaint.

WHEREFORE, Plaintiffs demand judgment against Defendants for a just and adequate amount of actual damages, punitive damages, costs incurred herein together with prejudgment and post-judgment interest, and other relief as the Court deems just and proper.

IV. DAMAGES

64. Plaintiffs, restate and reallege each and every other paragraph (and subparagraph) of this Complaint, including those paragraphs appearing above and below, and by this reference incorporate the same as though fully set forth herein.

65. That as a direct and proximate result of the aforesaid acts and omissions of the Defendants, jointly and severally, Plaintiff, Starr Swearingen Waneck, was seriously injured as a result of blunt force trauma..

66. That as a direct and proximate result of the Defendants' negligence, gross negligence, negligence *per se*, recklessness, and/or wrongful acts, as set forth hereinabove, Plaintiff, Starr Swearingen Waneck suffered severe, permanent and long-lasting injuries both economic and non-economic, including as follows:

- a) The reasonable, usual and customary cost of the past, present and future medical care rendered to Plaintiff;
- b) The increased living and medical expenses caused by the injuries suffered as a result of the Collision, including, but not limited to, the amount of increased expenses as determined by a life care planner, physician or economist;
- c) Lost wages and future earnings capacity;

- d) Past, present and future physical and mental pain and suffering;
- e) An orbital fracture, fractured jaw, facial scarring and traumatic brain injury.
- f) Past, present and future loss of enjoyment of life;
- g) Past, present and future loss of function of the body and mind;
- h) Past, present and future disability and psychological injuries;
- i) Past, present and future pain and suffering, disfigurement, inconvenience and loss of time;
- j) Property damage;
- k) Loss of consortium; and,
- l) In other respects as may be revealed through discovery or at trial.

67. That as a direct and proximate result of the Defendants' negligence, gross negligence, negligence *per se*, recklessness, and/or wrongful acts, as set forth hereinabove, Plaintiff, Jimmy Lee Waneck, has been caused to lose the society, companionship, love and affection of Starr Swearingen Waneck, the loss of aide, services and physical assistance provided by Starr Swearingen Waneck, and the loss of participation together in the activities, duties and respnsibilities of making a home with Starr Swearingen Waneck.

68. The negligence, gross negligence, negligence *per se*, willful and wanton conduct, recklessness, intentional conduct, and reckless and intentional disregard for the safety of the traveling public, of each of the Defendants, jointly and severally, as described hereinabove, was a direct and proximate cause of the Plaintiffs' injuries and damages hereinabove alleged.

V. DEMAND FOR JURY TRIAL AND RIGHT TO AMEND

69. Plaintiffs demand a trial by jury on all causes of action.

70. Plaintiffs specifically reserve the right to amend this First Amended Complaint.

VI. PRAYER

WHEREFORE, Plaintiffs pray for judgment against the Defendants, jointly and severally, in a fair and reasonable sum for compensatory damages, punitive damages, costs incurred and expended herein, and attorneys' fees as allowed by law, together with prejudgment and post-judgment interest, and other relief as the Court deems just and proper.

Respectfully submitted:

BURNS, CUNNINGHAM & MACKEY, P.C.

William M. Cunningham, Jr. (99879)
Troy T. Schwant (100394)
Post Office Box 1583
Mobile, Alabama 36633
Telephone: (251) 432-0612
Facsimile: (251) 432-0625
Email: wmcunningham@bcmlawyers.com
tschwant@bcmlawyers.com

DEFENDANTS TO BE SERVED VIA CERTIFIED MAIL AS FOLLOWS:

CSX CORPORATION
c/o C.T. Corporation System, Registered Agent
4701 Cox Rd., Suite 285,
Glen Allen, Virginia 23060

CSX TRANSPORTATION INC.
c/o C.T. Corporation System, Registered Agent
645 Lakeland East Drive Ste 101,
Flowood, Mississippi 39232

ECHO TRANSPORTATION SOLUTIONS, LLC
c/o Elisa C. Fox, Registered Agent
Decker Jones,
801 Cherry Street, Suite 2000
Ft. Worth, Texas 76102

TBL GROUP, INC.
c/o Elisa C. Fox, Registered Agent
Decker Jones,
801 Cherry Street, Suite 2000
Ft. Worth, Texas 76102

LOUIS AMBROSE JR.
2109 Joyner Ranch Rd
Fort Worth Texas 76134

DIAMOND TOURS INC.
c/o E. Murray Moore Jr., Registered Agent
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32302

APPENDIX D

CAUSE NO. DC-17-02842

Dee Voigt, Individually and as
Representative of the Estate of Peggy
Hoffman, Deceased, and on Behalf of all
Those Entitled to Recover for the Death of
Peggy Hoffman, Deceased, under the
Texas Wrongful Death act;

Plaintiffs,

VS.

Echo Tours and Charters, LP dba Echo
Transportation; TLB Group Inc.; Diamond
Tours Inc.; CSX Transportation, Inc.; and
John Doe

Defendants.

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

COME NOW, PLAINTIFFS DEE VOIGT, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF PEGGY HOFFMAN DECEASED, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER FOR THE DEATH OF PEGGY HOFFMAN, DECEASED, UNDER THE TEXAS WRONGFUL DEATH ACT complaining of ECHO TOURS AND CHARTERS, LP DBA ECHO TRANSPORTATION; TLB GROUP INC.; DIAMOND TOURS INC.; CSX TRANSPORTATION, INC.; AND JOHN DOE and respectfully show the Court as follows:

I.
DISCOVERY TRACK

1.1 Plaintiffs plead that this case should be assigned to Discovery Track Three pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, and will seek an agreed Order or other Court Order to this effect.

II.
PARTIES

2.1 Plaintiff, Dee Voigt, is an individual citizen and resident of McMahan, Texas. He is bringing his individual wrongful death claims for the loss of his mother, Peggy I Hoffman. He is also bringing claims as the Representative of the Estate of Peggy Hoffman, and on behalf of all those entitled to recover for the death of Peggy Hoffman, under the Texas Wrongful Death Act.

2.2 Defendant, ECHO Tours and Charters, LP d/b/a ECHO Transportation (hereafter referred to as ECHO), is a Texas limited partnership with its principal place of business in Dallas, Texas. ECHO can be served at its principal place of business located at 9314 West Jefferson Blvd., Dallas, TX 75211.

2.3 Defendant, TBL Group Inc. (hereafter referred to as TBLG), is a Texas corporation with its principal place of business in Houston, Texas. TBLG can be served with process through its registered agent, Elisa Fox, at 801 Cherry Street, Unit 46, Fort Worth, TX 76102.

2.4 Defendant, Diamond Tours, Inc. (hereafter referred to as Diamond Tours), is a Florida Corporation with its principal place of business in Fort Meyers, Florida. Diamond Tours can be served with process through its registered agent, E. Murray Moore Jr., at 215 S. Monroe Street, Suite 200, Tallahassee, FL 32302.

2.5 Defendant, John Doe, was the driver of a passenger bus involved in the

accident giving rise to this lawsuit. Plaintiffs have sought, but are unable to obtain, exact identifying information as to John Doe. Defendant Doe is an individual believed to be employed by ECHO. Defendant Doe is believed to be a resident of Texas.

2.6 CSX Transportation, Inc. is a Virginia corporation doing business in the State of Texas with its principal place of business in Jacksonville, Florida. CSX Transportation, Inc. can be served with process through its registered agent, CT Corporation System, at 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

III. JURISDICTION AND VENUE

3.1 The amount in controversy far exceeds the minimal jurisdictional limits of this Court. Pursuant to Texas Rule of Civil Procedure 47(c), Plaintiffs state that they seek, by their lawsuit, monetary relief over \$1,000,000.00.

3.2 Venue in this case is proper in Dallas County, Texas, under the general venue rule of Section 15.002(a)(2) of the Texas Civil Practice and Remedies Code, because it is the county of defendant, ECHO's principal place of business at the time the cause of action accrued.

3.3 Venue is proper in Dallas County as to all Defendants pursuant to Section 15.005 of the Texas Civil Practice and Remedies Code because venue is proper in Dallas County as to Defendant ECHO, and because all of Plaintiffs' claims arise out of the same transaction, occurrence, or series of transactions or occurrences.

3.4 Plaintiffs expressly disavow that any claims are being made pursuant to federal law, treaties, or constitution. Although the amount in controversy exceeds \$75,000.00, there is a lack of complete diversity because at least one plaintiff and one defendant are both citizens of Texas. Further, one or more of the properly joined and

served Defendants are citizens of the state in which this action is brought. Any removal, or consent to removal, of this case to federal court would be improper.

IV.
GENERAL ALLEGATIONS OF FACTS

4.1 On March 7, 2017, an ECHO bus traveling from Austin, Texas to Biloxi, Mississippi was struck by a CSX freight train, leaving at least four people dead and numerous passengers injured. The accident happened at approximately 2:15 p.m., as the northbound charter bus, carrying more than 40 people, was stopped, straddling the tracks at the Main Street railroad crossing in Biloxi, Mississippi. The charter bus appeared unable to move from the crossing, when the 52-car train, pulled by three locomotives, slammed into the charter bus. The force of the collision pushed the bus approximately 200 feet after impact.

4.2 A "Humped" crossing sign indicating low ground clearance was posted several feet in advance of grade crossing.

4.3 After the accident, it took more than thirty minutes for witnesses and emergency crews to remove injured passengers through the emergency windows. The investigation into the cause of the accident is ongoing.

4.4 Defendant John Doe was driving the bus in the course and scope of his employment for ECHO. Peggy Hoffman of Lockhart, Texas was a passenger in the bus and paid consideration to Diamond Tours for transportation in the Echo bus. As a result of this accident, Peggy Hoffman suffered serious personal injuries, which ultimately resulted in her death. Mrs. Hoffman, a retired assistant principal of Lockhart High School, was traveling to South Mississippi on a seven-day charter trip organized by Bastrop Senior Center.

4.5 Two months prior, on January 5, 2017, another CSX Transportation train hit a Pepsi delivery vehicle at precisely the same Main Street crossing. The tractor-trailer had become hung up and immobilized by the steep grade at the crossing. The driver of the Pepsi truck, after he was unable to move his vehicle, called for help and had attempted to flag down the CSX train before it ultimately crashed into his stopped truck.

4.6 In fact, at this precise crossing there have been sixteen (16) similar accidents since 1976.

4.7 Dallas-based ECHO is a wholly owned subsidiary of TBLG. ECHO and TBLG are common carriers who are in the business of carrying passengers for hire, hold themselves out for hire by the public, and are available for hire by the general public. The Defendants were in the course of acting as common carriers with regard to Peggy Hoffman, at the time of the subject incident.

CLAIMS FOR RELIEF

V. NEGLIGENCE

5.1 Defendants JOHN DOE, ECHO, TBLG, and Diamond Tours committed actions of omission and commission, which collectively and severally, constituted negligence, which were proximate causes of the death of Ms. Hoffman.

5.2 Defendant John Doe had a duty to exercise a high degree of care and breached that duty by:

- (a) failing to control the bus;
- (b) failing to keep a proper lookout as a reasonable and prudent person would have done;

- (c) failing to act as a reasonable and prudent person would have done; and
- (d) failing to abide by and/or observe traffic signs.

5.3 Defendant ECHO is liable for the conduct of Defendant John Doe under the doctrine of *respondent superior* because John Doe, at all relevant times, acted within the course and scope of his employment for Echo. At the time of the incident, Defendant John Doe was operating the vehicle in the course and scope of his employment and/or agency for Defendant Echo. Defendant Echo intentionally granted Defendant John Doe the authority to act on behalf of Echo. The relevant acts of Defendant John Doe were performed while in the employment of Echo, to further its business, to accomplish the objective for which Defendant John Doe was hired, and within the scope of his employment or within the authority delegated to him. Defendant Echo, therefore, is vicariously liable for the negligence of Defendant John Doe.

5.4 Defendant ECHO committed acts of omission and commission, which collectively and severally constituted negligence and which were a proximate cause of the injuries and the damages of Plaintiffs.

5.5 Defendants, ECHO and TBLG had a duty to exercise a high degree of care and breached that duty by acts of negligence that include, but are not limited to, failing to properly train drivers of vehicles regarding the appropriate methods and procedures for safely handling the vehicle and its passengers in emergency situations.

5.6 The negligence of Defendants ECHO, TBLG, and John Doe on the occasion in question was a proximate cause of the occurrence in question and the injuries and the damages of Plaintiffs.

5.7 ECHO and TBLG are jointly and severally liable for the damages arising out of this incident because they are a joint enterprise and/or joint venture with regard to the operation and maintenance of the charter bus.

**VI.
CAUSE OF ACTION AGAINST CSX TRANSPORTATION - NEGLIGENCE**

6.1 CSX Transportation committed acts of commission and omission, collectively and severally, constituting negligence, which were a proximate cause of the accident, the death of Peggy Hoffman, and Plaintiffs' damages.

6.2 CSX Transportation had a duty to maintain the subject railroad crossing where the incident occurred, including the duty to maintain the condition of the roadway traversing the crossing and its grade. CSX Transportation owed a duty to the driving public to act reasonably when maintaining the subject railroad crossing, to ensure that the crossing was not ultrahazardous or so dangerous that persons using ordinary care could not pass over it safely. It also had a duty to act reasonably to adequately warn the driving public of the existence of any ultra hazardous conditions in the crossing. CSX Transportation failed to act reasonably, because, at the time of the subject collision, the railroad failed to prevent the ultra hazardous conditions.

6.3 CSX Transportation's acts and omissions proximately caused the subject train/vehicle collision, the death of Peggy Hoffman, and Plaintiffs' damages.

**VII.
COMPENSATORY DAMAGES**

7.1 As a result of the injuries and death of Peggy Hoffman, Plaintiff Dee Voigt, seeks compensatory damages from the defendants arising from the injuries he suffered to the degree of care, maintenance, services, advice, counsel, love, comfort, affection, protection, emotional support, companionship, and society, which he

otherwise would have received from his mother, Peggy Hoffman; mental anguish; and any pecuniary damages, all of which were sustained in the past and in reasonable probability will be sustained in the future, in an amount in excess of \$75,000.00.

7.2 As a result of the conduct of Defendants, Peggy Hoffman's Estate seeks monetary damages from Defendants to compensate for pain and suffering, mental anguish, medical expenses, and funeral and burial expenses of Peggy Hoffman.

**VIII.
PRE-JUDGMENT AND POST-JUDGMENT INTEREST**

8.1 Plaintiffs seek pre-judgment and post-judgment interest as provided by law.

**IX.
RESERVATION OF RIGHTS**

9.1 Plaintiffs reserve the right to prove the amount of damages at trial. Plaintiffs reserve the right to amend their petition and add additional counts and/or parties as discovery continues.

**X.
CONDITIONS PRECEDENT**

10.1 All conditions precedent to Plaintiffs' right to recover and Defendants' liability have been performed or have occurred.

**XI.
JURY DEMAND**

11.1 Plaintiffs request a trial by jury.

**XII.
REQUESTS FOR DISCLOSURE**

12.1 Pursuant to Rule 194 of the Texas Rules of Civil Procedure, all parties named herein as Defendants are to disclose, within fifty (50) days of service of this

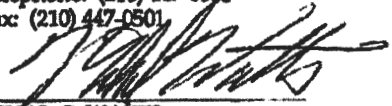
request, the information and material described in the Texas Rules of Civil Procedure 194.2(a)-(l).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein, that this cause be set for trial before a jury, and that Plaintiffs recover judgment of and from Defendants for their damages, in such amount as the evidence shows and the jury determines to be proper, together with pre-judgment interest and post-judgment interest, costs of suit, and such other and further relief to which Plaintiffs may show themselves to be entitled, whether at law or in equity.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

STATE OF TEXAS }
COUNTY OF DALLAS }

I, FELICIA PIERRE, Clerk of the District of Dallas County,
Texas, do hereby certify that I have compared the original
with the copy and the original is correct. The original is on
file in my office.

Witness my hand and the seal of my office
this 10th day of April, 2017.

FELICIA PIERRE, CLERK OF DISTRICT CLERK
DALLAS COUNTY, TEXAS

[Signature] Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEE VOIGT, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:17-CV-01018-N
	§	
CSX TRANSPORTATION, INC., <i>et al.</i> ,	§	
	§	
Defendants.	§	

DARWYN HANNA, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:17-CV-01023-N
	§	
CSX TRANSPORTATION, INC., <i>et al.</i> ,	§	
	§	
Defendants.	§	

ORDER

This Order addresses Plaintiff Dee Voigt and Intervenor Plaintiffs Melissa Messerly, Kimberly Kay Chapman, Aubrey O. Landrum, Karen O. Landrum, Annie May Havran, Tim Orr, Catherine Sheets, Charles Sheets, Leslie Schell, Mary Lucas, Mary Hall, Linda Cox, Betty Rabel, JC Rabel, Louisa Cruz, Juanita Cruz, Priscilla Torres, Justine Nygren, Jill McCan, Santiago De La Cruz, Mary De La Cruz, Mike Turner, Catherine Turner, and Gladys Jane Frank's motion to remand [10] in Civil Action No. 3:17-cv-01018-N ("*CSXT F*") and Plaintiffs Darwyn Hanna, Marie Hanna, Helen Dailey, Gloria Medina, Charles Keathley, Mary Ellen Keathley, Duane McKervery, Kim McKervery, and Evelyn Voit's motion to

remand [13] in Civil Action No. 3:17-cv-01023-N (“*CSXT II*”). Because federal law completely preempts the *CSXT I* and *CSXT II* Plaintiffs’ state law negligence claims, the Court denies the motions.

I. ORIGIN OF THE DISPUTE

This case arises from a railroad crossing accident in Biloxi, Mississippi where a casino tour bus, owned by Defendant Echo Transportation, Inc. (“Echo”), traveling from Bastrop, Texas was struck by a train owned and operated by CSX Transportation, Inc. (“CSXT”) at a rail crossing (“the Biloxi crossing”). The *CSXT I* Plaintiffs consist of relatives of the deceased passengers. The *CSXT II* Plaintiffs consist of nine passengers of the casino tour bus. Both cases were originally filed in Dallas County and alleged similar negligence claims against the Defendants. CSXT subsequently removed the cases to federal court. CSXT claims the Interstate Commerce Commission Termination Act (“ICCTA”) preempts the *CSXT I* and *CSXT II* Plaintiffs’ state law negligence claims and thus federal question jurisdiction exists. *See* Notice of Removal [1] *in CSXT I*, Notice of Removal [1] *in CSXT II*. The *CSXT I* and *CSXT II* Plaintiffs now request the Court remand the cases back to state court. Because of the similar legal issues advanced in both motions, the Court considers them together.

**II. UNDER FIFTH CIRCUIT PRECEDENT THIS COURT HAS
SUBJECT MATTER JURISDICTION TO HEAR THIS CASE**

CSXT removed this case to federal court under 28 U.S.C. § 1441, which permits removal only of actions over which “the district courts of the United States have original jurisdiction” *Id.* § 1441(a). CSXT argues these cases present a federal question under ICCTA because the Plaintiffs’ state law claims are completely preempted by ICCTA. Because the Court agrees complete preemption is present, this Court must construe the Plaintiffs’ complaint as raising a federal claim and therefore “arising under” federal law.

Under the well-pleaded complaint rule, a state court cause of action can be removed to federal court when the federal claim is apparent on the face of the complaint, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); it is not sufficient for the complaint to suggest that a federal defense may be raised. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). In both *CSXT I* and *CSXT II*, the Plaintiffs’ petitions stated only state law claims. CSXT argues that federal jurisdiction is still present under the complete preemption exception to the well-pleaded complaint rule. *Elam*, 635 F.3d at 803 (“An exception to the well-pleaded complaint rule arises when Congress ‘so completely preempt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character.’”) (quoting *Gutierrez v. Flores*, 543 F.3d 248, 252 (5th Cir. 2008)).

The Court must distinguish complete preemption from ordinary preemption. *See PCI Transp., Inc. v. Fort Worth & W. R. Co.*, 418 F.3d 535, 543–45 (5th Cir. 2005). Ordinary preemption, or defensive preemption, provides a defense to a state law cause of action on the basis that federal law has preempted the state law supporting the claim, through one of the

three subspecies of ordinary preemption: express preemption, conflict preemption, or field preemption. Ordinary preemption does not give this Court federal question jurisdiction. *Caterpillar*, 482 U.S. at 393 (“Thus, [i]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption.”) (emphasis in original). However, certain federal statutes have such “extraordinary” preemptive force that state law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims, i.e., completely preempted. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). “[C]omplete preemption is a ‘narrow’ exception to the well-pleaded complaint rule.” *Elam*, 635 F.3d at 803.

The “proper focus of complete preemption analysis is on whether Congress intended that the federal action be exclusive, as opposed to whether Congress intended that the claim be removable.” *PCI*, 418 F.3d at 544. “Congress can indicate its preemptive intent either expressly through a statute’s plain language, or impliedly through a statute’s ‘structure and purpose.’” *Elam*, 635 F.3d at 803 (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 (2008)). While generally there is an assumption against preemption, the assumption “applies with less force when Congress legislates in a field with ‘a history of significant federal presence’ and ‘[h]istorically, federal regulation of railroads has been extensive.’” *Id.* at 804 (internal quotations and citations omitted).

Congress passed ICCTA to “build[] on the deregulatory policies that have promoted growth and stability in the surface transportation sector.” *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 804 (5th Cir. 2011) (alteration in original). ICCTA established the new Surface

Transportation Board (STB) to regulate rail transportation. *Id.* Under Fifth Circuit precedent, ICCTA expressly preempts a plaintiff's tort claim where it "directly attempts to manage or govern a railroad's decisions in the economic realm." *Elam*, 635 F.3d at 807.

Section 10501(b) of ICCTA provides:

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). The Fifth Circuit has stated that ICCTA completely preempts state laws that "fall squarely" under section 10501(b). *Elam*, 635 F.3d at 806. A state law falls squarely under section 10501(b) where it "attempts to manage or govern rail transportation in the economic realm." *Id.* at 806–07. "The Fifth Circuit also recognized the potential for a state law to be impliedly preempted if the law has 'the effect of unreasonably burdening or interfering with rail transportation.'" *Battley v. Great W. Cas. Ins. Co.*, 2015 WL 1258147, at *3 (M.D. La. 2015) (quoting *Elam*, 635 F.3d at 805).

Here, the Plaintiffs assert several theories of negligence against CSXT in both *CSXT I* and *CSXT II*. In both cases, the Plaintiffs assert CSXT failed to maintain the Biloxi crossing because of the crossing's steep grade, which made it ultra-hazardous. *See App. to Notice of*

Removal Ex. A, 10–20 (“Pls.’ Orig. Pet.”) ¶¶ 6.1–6.2 [1-1] in *CSXT I*; App. to Notice of Removal Ex. A 75–90 (“Pls.’ Second Am. Pet.”) ¶¶ 41–42 [1-1] in *CSXT II*; App. to Notice of Removal Ex. A, 47–57 (“Pls.’ Pet. in Intervention”) ¶¶ 6.1–6.3 [1-1] in *CSXT II*. The issue, therefore, is whether CSXT has demonstrated that the Plaintiffs’ claims would “directly or impliedly [have] the effect of managing or governing rail transportation in the economic realm.” *Battley*, 2015 WL 1258147 at *5. The Court concludes that the Plaintiffs’ negligence claims challenging the construction of the railroad crossings, fall squarely under section 10501(b).

Here, CSXT contends the Plaintiffs’ claims, specifically that the railroad crossings’ grade was too steep, “seek[] to manage a railroad’s decisions in how to run its railroad by dictating how CSXT should manage and operate the Biloxi crossing.” *See* Notice of Removal ¶ 9 [1] in *CSXT I*. The Plaintiffs contend that under Fifth Circuit precedent, a “typical negligence claim seeking damages for a typical crossing accident . . . does not directly attempt to manage or govern a railroad’s decision in the economic realm.” *See* Mot. to Remand 5 in *CSXT II* (quoting *Elam*, 635 F.3d at 813). But such a simple, categorical test is far from the test the Fifth Circuit adopted in *Elam*. Contrary to the Plaintiffs’ assertions, *Elam* did not hold categorically that ICCTA’s complete preemption cannot apply to negligence claims based on personal injuries sustained in a railroad crossing case. Instead, in *Elam*, the Fifth Circuit held that section 10501(b) “completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad’s decisions

in the economic realm.” 635 F.3d at 807. Such a test involves a factual inquiry into the circumstances of each case, including whether the case is a “typical negligence claim.”

In fact, the Court is not aware of any case in this Circuit that has interpreted *Elam* as proffering the simplistic test suggested by the Plaintiffs. For instance, in *Anderson v. Union Pac. R. Co.*, 2011 WL 4352254 (M.D. La. 2011), the court held there was no complete preemption because defendant failed to carry its burden to show evidence that something in the plaintiff’s claims “directly or impliedly has the effect of managing or governing rail transportation.” *Anderson*, 2011 WL 4352254, at *4. Similarly, in *Battley v. Great W. Cas. Ins. Co.*, 2015 WL 1258147 (M.D. La. 2015), the court held that under the “circumstances presented in this case” a judgment for the plaintiffs “would have only an incidental and limited effect on rail transportation.” *Battley*, 2015 WL 1258147, at *4. In addition, in *Battley* the court noted the defendant “failed to provide any substantive argument demonstrating that the effect of judgment in this case could unreasonably burden or interfere with rail transportation” to support a finding of implied preemption. *Id.* Importantly, neither of cases stated that because the plaintiffs’ claims arose under a theory of negligence, it was a personal injury claim that could not be preempted by ICCTA. Moreover, in neither of the cases would a judgment for the plaintiffs necessitate changes in design and construction of railroad tracks and crossings.¹

¹It is clearly established that the STB has exclusive jurisdiction over “transportation by rail carriers” and “construction . . . of spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. § 10501(b); *see also Midlothian*, 669 F.3d at 533 (“The ICCTA prohibits [defendant] from controlling how railroad track embankments are constructed.”).

Here, the Plaintiffs claim the crossing's design and construction was ultra hazardous; this would necessarily regulate CSXT's economic decisions should the Plaintiffs be successful. The Fifth Circuit has already noted, in the context of claim preemption, that laws that "dictate[] the construction design and layout of railroad tracks would frustrate economic decision making." *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding ordinance that would regulate the slope or other features of railroad track embankments are expressly preempted by ICCTA).² And preemption is not only reserved for cases where a regulation specifically calls out aspects of track construction. As one court noted, "[t]he application of state law negligence principles to assess and evaluate the suitability of the design and construction of a railroad crossing qualifies as an attempt at state law 'regulation' in respect to rail transportation." *In re Katrina Canal Breaches Consol. Litig.*, 2007 U.S. Dist. LEXIS 95799, *124 (E.D. La. 2007).

The cases presented by the Plaintiffs do not instruct otherwise. For instance, in *Elam* the plaintiffs' negligence claim was based on the railroad's failure to provide adequate warnings. A judgment in favor of the *Elam* plaintiffs would have had no effect on the economic decisions of the railroad – it would have required the railroad post additional warnings, not reconfigure railroad crossings. Moreover, in *Battley* the plaintiffs' negligence claim had nothing to do with the design and construction of the railroad, nor did "the claim

²The Court notes that while the issue in *Midlothian* was claim preemption, not removal preemption, it may still inform the Court's decision as "[c]omplete preemption and removal jurisdiction are simply two sides of the same coin: a finding of complete preemption 'represents a conclusion that all claims on the topic arise under federal law, so that 28 U.S.C. § 1441 permits removal.'" *Elam*, 635 F.3d at 810.

challenge [the railroad's] general operating procedures.” *Id.* The *Battley* plaintiffs’ claim was that the railroad was negligent in refusing to move the train from a crossing to allow emergency vehicles to cross. *Id.* The *Battley* court noted that “a decision in this action will not create a general policy prohibiting railroad companies from blocking roadways” precisely because of the “unique circumstances existing at the time of the accident.” *Id.* But that is not the case here. In this case, the Plaintiffs’ main contention is based on the construction of the Biloxi crossing. The Plaintiffs’ claim directly challenges CSXT’s general operating procedure as it pertains to design and construction of railroad crossings. It is clear that a judgment in favor of the Plaintiffs here would have the effect of managing CSXT’s rail transportation and have more than an incidental and limited effect on rail transportation. For instance, a decision in this action that the railroad crossing was negligently constructed would necessitate a closure of the Biloxi crossing, and others similarly constructed, to rebuild them or face future liability for negligence because of the construction of such crossings. Thus a judgment for the Plaintiffs in this case would have “the effect of managing or governing rail transportation in the economic realm.” *Battley*, 2015 WL 1258147 at *5.

Moreover, CSXT has submitted evidence to demonstrate that a judgment in the Plaintiffs’ favor would unreasonably burden or interfere with its operations. CSXT submits two declarations. *See* App. to Def.’s Notice of Removal (“Hendrickson Decl.”) Ex. B [1-2] *in CSXT I*; App. to Def.’s Notice of Removal (“Smith Decl.”) Ex. C [1-2] *in CSXT I*; App. to Def.’s Notice of Removal (“Hendrickson Decl.”) Ex. B [1-2] *in CSXT II*; App. to Def.’s Notice of Removal (“Smith Decl.”) Ex. C [1-2] *in CSXT II*. These declarations assert that

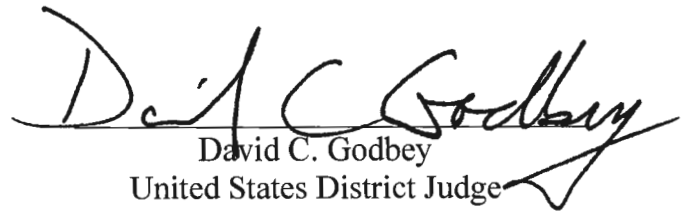
reconfiguring the Biloxi crossing to avoid the allegedly “ultra-hazardous” grading and slope would unreasonably burden CSXT’s operations. Specifically it would require closing the Biloxi crossing temporarily to reconstruct the crossing itself, and likely other crossings nearby to keep the track level. Hendrickson Decl. ¶¶ 11–12. Closing the crossing itself would be a timely and difficult process, requiring approval from local government and state agencies. Smith Decl. ¶¶ 6–8. Because the Biloxi line is part of the United States military’s Strategic Rail Corridor Network, the military would have influence in the final decision as to closure decisions, as does the Surface Transportation Board. Moreover, temporarily closing the Biloxi crossing would also block access to CSXT’s New Orleans hub. Hendrickson Decl. ¶ 6. This would interrupt rail traffic and require CSXT to reroute trains, causing delays and congestion, in addition to costing CSXT considerable amounts of money. *See id.* ¶ 9 (discussing costs associated with rerouting). CSXT also explains that to regrade and lower the track at the Biloxi crossing would require CSXT to tear up at least two miles of track. *See id.* ¶ 11 (explaining the process to lower the track). Thus CSXT has demonstrated that providing a more gradual grade for the Biloxi crossing would be an unreasonable burden and interfere with its operations.

CSXT has demonstrated that the Plaintiffs’ negligence claims based on design and construction of the grade at the Biloxi crossing directly attempt to manage or govern CSXT’s decisions in the economic realm. Accordingly, the Court finds that ICCTA preempts the Plaintiffs’ state law claims and that CSXT properly removed this case to this Court under its federal question jurisdiction.

CONCLUSION

For the foregoing reasons, the Court denies the motions to remand. Accordingly the stay is lifted. The Court orders the Plaintiffs to respond to the pending motions to dismiss within twenty one (21) days of this Order.

Signed June 19, 2017.


David C. Godbey
United States District Judge

Certificate of Service

I hereby certify that on this 5th day of March, 2018, I served a true and correct copy of the foregoing Petition for Declaratory Order on the following counsel of record for the parties in *Starr Swearingen Waneck and Jimmy Lee Waneck v. CSX Transportation Corp., et al.*, Southern District of Mississippi case number C.A. No. 1:17-cv-00106, by first class mail, postage prepaid:

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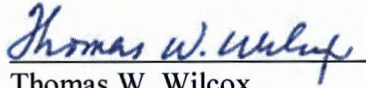
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