

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36167

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

**REPLY OF CSX TRANSPORTATION, INC. IN OPPOSITION TO
PETITION FOR DECLARATORY ORDER**

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Dated: March 26, 2018

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CSX Transportation, Inc. (“CSXT”) objects to the Petition for Declaratory Order (“Petition”) filed by Jimmy Lee Waneck and Starr Swearingen Waneck (“Petitioners”) in this docket on March 5, 2018. The Petition should be denied outright. This matter is pending before a federal court and the Surface Transportation Board (“Board”) should adhere to its general policy of non-interference in pending federal litigation. Moreover, the issues presented in the Petition are case-specific, are based on statutes other than the ICC Termination Act (“ICCTA”), and are of the type that federal courts are well suited to decide. The Board should therefore deny this Petition outright—without providing any boilerplate guidance—to avoid confusion, to conserve scarce agency resources, and to discourage parties dissatisfied with one federal case (and having failed to raise new legal arguments in another) from seeking a second bite at the apple.

BACKGROUND

On March 7, 2017, a charter bus became lodged on the Main Street crossing in Biloxi, Mississippi and was struck by a CSXT freight train. Lawsuits were filed against CSXT in Texas and Mississippi state court. From CSXT’s perspective, the lawsuits shared two fundamental features. Each sought to use a state tort action to regulate the construction, operation, and maintenance of the CSXT mainline. And

neither complaint sufficiently identified any federal safety standards allegedly violated by CSXT, as required by the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Accordingly, CSXT exercised its right—pursuant to 28 U.S.C. §§ 1441 and 1446 and well-settled Fifth Circuit authority regarding the jurisdictional doctrine of complete preemption—to remove both cases to federal court in Texas and Mississippi.

In the Texas case, the plaintiffs moved to remand to state court, arguing that ICCTA did not completely preempt their claims for federal jurisdiction purposes. The federal court correctly rejected plaintiffs’ arguments and ruled that ICCTA preempted their state claims as an unlawful attempt to regulate or manage rail operations. This finding rested on specific allegations in the complaint and verified statements from CSXT officials that demonstrated that a judgment in the plaintiffs’ favor would “unreasonably burden or interfere with [CSXT’s] operations.” *Voigt v. CSX Transp., Inc.*, No. 17-CV-01018, at 9 (N.D. Tex. June 19, 2017) (*see* Pet. Appendix E). Reconfiguration of the crossing, according to the Texas federal district judge, would require the closing of the crossing, blocking access to the New Orleans hub and restricting the US military’s strategic rail corridor network. *Id.* at 10. Lowering the track at the Biloxi crossing, to provide a more gradual highway grade, would require CSXT to tear up track for at least two miles. *Id.* Because “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,” the Court correctly concluded that “ICCTA preempts the Plaintiffs’ state law claims.” *Id.* The Court therefore declined to remand the case back to Texas state court. *Id.*

Notably, the plaintiffs in the Texas case never alleged a federal safety standard allegedly violated by CSXT. The Texas case therefore involved a

straightforward application of ICCTA preemption to a state tort action for federal jurisdiction purposes based on the record and binding Fifth Circuit precedent. The plaintiffs did not appeal or otherwise challenge the unfavorable Texas decision.

Unlike in the Texas case, the plaintiffs in the Mississippi case have not moved to remand to state court or otherwise challenge federal jurisdiction. Accordingly, CSXT moved to dismiss the case based on its ICCTA and Federal Railway Safety Act (“FRSA”) preemption defenses. CSXT’s preemption motion was fully briefed over 8 months ago.

CSXT is attaching as exhibits the lengthy briefings before the federal district court. *See* Exs. 1–3. As those briefings reveal, CSXT urged the federal court to find federal preemption on one of two grounds. First, it argued that the state tort action is preempted under ICCTA as in impermissible attempt to regulate the construction, operation, and maintenance of the CSXT mainline. CSXT Motion to Dismiss at 5–9 (attached as Ex. 1). Second, CSXT argued that Plaintiffs’ claims were also preempted by FRSA and that the bare and brief citations to federal regulations in the complaint were insufficient to provide CSXT fair notice of what the claims are and the grounds upon which they rest. *Id.* at 11.

The plaintiffs naturally disagreed with CSXT’s ICCTA analysis, arguing that their tort claims only challenge the maintenance practices of CSXT, and not the construction or operation of the Line. Plaintiffs’ Response in Opposition to Motion to Dismiss at 4 (attached as Ex. 2). Plaintiffs further claimed that the unexplained references in the complaint to federal safety regulations were sufficient. *Id.* at 21. Of note, the plaintiffs also had a full opportunity to brief the Mississippi federal judge on their disagreement with the Texas preemption opinion. *See* Exs. 6–7. And—as the Board can determine for itself by reviewing the attached briefing (*see*

Exs. 1–3)—the plaintiffs failed to present to the Mississippi judge the primary argument that it makes for the first time here, *i.e.* that ICCTA and FRSA must be “harmonized” such that ICCTA never preempts state law claims that may also implicate the FRSA’s savings clause.

DISCUSSION

I. The Board Should Adhere to Its General Policy of Non-Interference in Pending Federal Litigation.

The Board does not generally interfere with pending federal litigation. *See CL Consulting & Mgmt. Corp. – Pet. for Decl. Order*, S.T.B. Docket No. 36042, slip op. at 3 (served Jan. 25, 2017) (denying petition for declaratory order when “[t]he parties are currently engaged in litigation in the district court with regard to their dispute”). Myriad orders explain that “issues involving federal preemption under 49 U.S.C. § 10501(b) can be decided by either the Board or the courts in the first instance.” *See, e.g., Tesoro Ref. & Mktg. Co. – Pet. for Decl. Order*, S.T.B. Docket No. 36041, slip op. at 4 (served Nov. 16, 2016). Recognizing this parallel power to decide preemption issues, the Board rejects attempts to use the Board as an end-run around the judicial process. *See, e.g., Ingredion Inc. – Pet. for Decl. Order*, S.T.B. Docket No. 36014, slip op. at 3 (served Sept. 30, 2016) (“[T]he state court is able to address any preemption arguments that may become relevant and has not referred any issues to the Board.”). The STB has concluded that when a judicial proceeding is pending, there is rarely any need for the agency to step in and issue a declaratory order. The district court will follow the precedents already set.

This general policy is particularly apt here for two reasons. First, the Board is not a forum for parties dissatisfied with a preemption decision by a federal district court. That would be an improper role reversal. If a federal court seeks

guidance from the agency, it retains the role to review the reasonableness of the agency decision, not vice versa. And if the plaintiffs in the Texas case (who have joined this Petition) wanted to challenge the unfavorable preemption decision, they should have taken the matter up through normal channels to the United States Court of Appeals for the Fifth Circuit. If the Board starts to entertain collateral attacks on federal district court rulings, it will open a floodgate of disgruntled litigants and the Board eventually will have to explain why it has usurped the constitutional role of the federal courts of appeal.

Second, the Board should not become an avenue for parties to raise new legal arguments that were not presented on a timely basis in an ongoing federal case. Plaintiffs are raising new “harmonization” arguments that were never presented to the federal district court in the Mississippi litigation. This new “harmonization” argument is also irrelevant, because “Plaintiffs fail to point to any regulation that CSXT has allegedly violated.” CSXT Rebuttal at 15 (attached as Exh. 3). In any event, the federal courts protect the integrity of their process and promote judicial economy by taking a very dour view of new legal arguments raised for the first time after the briefing is complete. *See, e.g., LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005) (“A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments.”); *Calvasina v. Wal-Mart Real Estate Bus. Tr.*, 899 F. Supp. 2d 590, 612-13 (W.D. Tex. 2012) (rejecting Defendants’ motion to supplement the record and looking with disfavor upon Defendants’ efforts to “continually change their argument and seek to introduce new arguments . . . from that originally presented to the Magistrate judge” and noting that “[t]he time for making arguments and presenting evidence was when the motions were pending before the Magistrate judge”). The Board should not facilitate an end-run around exacting federal procedural rules by entertaining this Petition.

II. The Declaration Sought Is Either Useless or Improper.

The Petition seeks two declarations from the Board. But the declarations sought are either so generalized as to be useless or are so broad and sweeping that they violate fundamental tenants of ICCTA preemption, which require an exacting, case-specific inquiry into the nature of the individual complaint.

Petitioners first request a generalized statement “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).” Pet. at 15 (emphasis added). If this is truly all Petitioners seek, that general statement is useless and self-evident. The Board itself has recognized that preemption determinations often require a case-by-case assessment. *CSX Transp. Inc. – Pet. for Decl. Order*, S.T.B. Docket No. 34662, slip op. at 4 (served May 3, 2005); *see also CSX Transp. Inc. – Pet for Decl. Order*, S.T.B. Docket No. 35832, slip op. at 5 (served Feb. 29, 2016) (recognizing that “in order to determine whether a party’s claims are preempted—regardless of whether the defense is characterized as categorical or as applied preemption—the Board or a court must know the basic facts about the party’s claims”). ICCTA preemption of a state tort action turns on the nature of the state complaint and whether the specific relief requested constitutes impermissible regulation of rail transportation.

There is nothing particularly earth shattering about the idea that ICCTA preemption is case specific and does not necessarily preempt all state tort law claims. The generalized statement sought in the Petition is therefore so broad as to be useless.

If, however, what Petitioners truly seek is a broad and sweeping declaration that ICCTA does not preempt their claims (or can never preempt a state tort claim

that is not itself preempted by FRSA), that declaration would be wildly inappropriate. A sweeping pronouncement that ICCTA cannot preempt a particular state claim—no matter how severe the burden on interstate commerce—would be breathtaking. Yet the need for a case-by-case assessment is just as important, perhaps more so, where a party claims the need to harmonize two federal statutes. Inherent in any attempt to harmonize two statutes is the requirement to “give effect to both if possible.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). To give effect to individual federal statutes, the facts of the case must be considered to determine whether the statutes apply, as well as the purpose of each provision, the claims and allegations in the specific complaints, and the burden on interstate commerce. Thus, any broad and sweeping pronouncement from the Board that ICCTA can never preempt these particular claims (or any claims based on FRSA violations) would be inappropriate and is inapposite to the law governing the harmonization of two federal statutes.

Further, the Petition apparently asks the Board to opine on the application of the FRSA preemption provision to the pending case and whether it trumps any potential ICCTA preemption claim. But “interpretation of statutes other than the Interstate Commerce Act is beyond [the Board’s] purview.” *U.S. Envtl. Prot. Agency – Pet. for Decl. Order*, S.T.B. Docket No. 35803, slip op. at 10 (served Dec. 30, 2014). The Board may, of course, express opinions regarding whether section 10501(b) preempts other federal statutes by “attempt[ing] to harmonize the two statutes.” *Thomas Tubbs et al. – Pet. for Decl. Order*, S.T.B. Docket No. 35792, slip op. at 7 (served Oct. 31, 2014). But, however couched, this Petition is not really about section 10501(b) at all. The Petitioners are seeking clarification “based upon the legislative history of the 2007 amendment to §20106(b) [of FRSA], and the courts’

interpretation of” FRSA.” Pet. at 11. Nearly a third of the petition is devoted to the interpretation of FRSA. *Id.* at 10–15.

The Board should be wary of unnecessarily opining on the proper interpretation of other federal statutes, including FRSA. *CL Consulting & Mgmt. Corp. – Pet. for Decl. Order*, S.T.B. Docket No. 36042, slip op. at 4 (served Jan. 25, 2017) (recognizing that the “interpretation [of another statute] would typically not be a matter for the Board” and noting the difference “between the statutory responsibilities of the Board and of federal safety regulatory agencies” in the preemption context). The plentiful citations to FRSA statutory history and federal court opinions interpreting FRSA provided by the Petitioners should have been (but were not) provided to the district court, who has the authority and competency to interpret all federal statutes.

Petitioners second request is for a declaration from the STB over what kind of state tort claims can be removed from state court to federal court under 28 U.S.C. §§ 1441 and 1446. More specifically, they seek a declaration 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 in the court in which they are raised.” Pet. at 15; *see also id.* at 11 (“The Board should clarify that . . . such [state tort actions] do not lead to complete preemption by § 10501(b), but rather are within the providence of the state court to review”) In other words, the Petitioners want the STB to declare that the proper forum to resolve all state tort law disputes is in state court, and they can never be removed to federal court. But the Supreme Court (and nearly every circuit court) has held that agencies do not have the power or expertise “to regulate the scope of the judicial power.” *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990); *Lopez–Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) (“[T]he determination of our jurisdiction is exclusively for the court to decide.”); *see*

also *B&H Med., LLC v. United States*, 116 Fed. Cl. 671, 682 (2014) (“Although HHS possesses the expertise to administer the Medicare program generally, it is without the expertise to determine a federal court’s subject matter jurisdiction.”). Indeed, it is the federal courts who “are the experts when it comes to determining the scope of federal-court subject matter jurisdiction.” *B&H Med.*, 116 Fed. Cl. at 682 (internal citations omitted). Accordingly, CSXT is not aware of a single Board decision ever purporting to limit the jurisdiction of federal courts in lawsuits raising ICCTA preemption.

Finally, providing “guidance” while denying this request—as urged by Petitioners in the alternative—is a recipe for confusion. *See* Pet. at 15 (requesting that, in the event the Board denies the Petition, it “nevertheless provide guidance to the parties and to the courts that are presently adjudicating this matter”). Reiterating boilerplate no longer has any value. Indeed, as the Board has acknowledged, courts have the benefit of prior agency published decisions when making their preemption determinations. *See, e.g., Tesoro Ref. & Mktg. Co. – Pet. for Decl. Order*, S.T.B. Docket No. 36041, slip op. at 4 (served Nov. 16, 2016) (“[R]eferral to the STB is neither efficient nor necessary. The preemption issue can be decided by th[e] Court . . . While the STB would be able to shed light on the [issues at hand], those issues are addressed in the statute and published agency decisions.” (quoting *Swinomish Indian Tribal Cmty. v. Bnsf Ry. Co.*, No. C15-543RSL, 2015 WL 9839703, at *2 (W.D. Wash. Sept. 11, 2015))). The Mississippi federal district court also has the benefit of no less than seven binding, published Fifth Circuit decisions addressing ICCTA preemption. And changing the boilerplate would either add unwanted ambiguity (if no substantive change were intended) or would deprive the public of the right to comment on any substantive changes. It offers nothing but delay and confusion. *See, e.g., CSX Transp. Inc. – Pet. for*

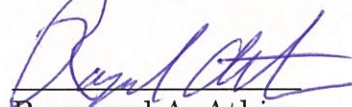
Declaratory Order, S.T.B. Docket No. 35832, slip op. at 3 (served Feb. 29, 2016) (issuing reconsideration decision to clarify “apparent confusion that has arisen over the Board’s holding” in an earlier decision that modified normal preemption boilerplate language).

CONCLUSION

In sum, the Board is not a reviewing court for parties dissatisfied with one federal district court ruling or seeking to raise new legal arguments it failed to present in another ongoing federal case. CSXT therefore requests that the Board decline to inject itself into an ongoing federal case, summarily reject the Petition, and let the federal district court resolve this dispute.

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Respectfully submitted,



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Dated: March 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2018, I caused a copy of the foregoing Reply in Opposition to Petition for Declaratory Order to be served by first class mail or more expeditious method upon:

Thomas Wilcox
GKG Law PC
1055 Thomas Jefferson St. NW
Suite 500
Washington, DC 20007



Tyler Domino

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and	)	
JIMMY LEE WANECK,	)	
	)	
Plaintiffs,	)	
	)	
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. 1:17-cv-00106-HSO-JCG

**MEMORANDUM IN SUPPORT OF
CSX TRANSPORTATION, INC.'S MOTION TO DISMISS**

This lawsuit, stemming from a March 2017 bus-rail collision, seeks through tort doctrine to regulate this nation’s rail transportation in ways that are permitted only by the federal Surface Transportation Board (“STB”) and the Federal Railroad Administration (“FRA”). Preemption doctrine prohibits this from occurring. The complaint’s tort claims against CSX Transportation (“CSXT”) with respect to rail crossing configuration, maintenance and operation are preempted by the federal Interstate Commerce Commission Termination Act (“ICCTA”). The complaint’s claims as to train operations and CSXT’s obligations over rail crossings are preempted by the Federal Railroad Safety Act (“FRSA”) inasmuch as they attempt to impose obligations upon CSXT beyond what FRA regulations require.

Moreover, the complaint is also subject to dismissal because it fails to allege facially plausible claims for relief.

Claims against CSXT should therefore be dismissed.¹

BACKGROUND

On March 10, 2017, a civil action was filed in the Circuit Court of Harrison County, Mississippi, styled “*Starr Swearingen Waneck, et al. v. CSX Corp., et al.*,” Case No. A2402-17-30. An amended complaint was filed on March 20, 2017 (ECF No. 1-1 at 40) (hereinafter the “complaint” or the “Am. Compl.”). The complaint arises from a March 7, 2017 collision between a CSXT freight train and a charter bus in Biloxi, Mississippi. Am. Compl. ¶¶ 19, 29, 30. The complaint alleges that the charter bus became lodged on the Main Street crossing, resulting in the ensuing collision. *Id.* ¶ 27. Named as defendants are CSXT, CSX Corporation, the bus company, the bus charter company, and the bus driver. *Id.* ¶¶ 4-11.²

The complaint takes aim at the Main Street crossing—specifically, at CSXT’s configuration, care and maintenance of the crossing. Plaintiffs contend that this rail crossing is “dangerous and severely inclined or ‘humped,’” *id.* ¶ 25; that the crossing is “dangerous” due to “automated CSX railroad maintenance practices,” *id.*; and that “[t]he Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad” in creating a “severe incline or ‘hump,’” *id.* ¶ 44.

¹ The filing of this Rule 12 motion tolls the deadline for filing an answer to the complaint. *See* Fed. Rule. Civ. Proc. 12(a)(4); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346 (3d ed. 2015) (Service of Responsive Pleadings—Time for Serving and Filing). Should there be any doubt on this score, CSXT is prepared instantly to answer on advisement of the Court.

² As explained in a separate motion filed this date, CSX Corporation (“CSX Corp.”) does not have minimum contacts with the State of Mississippi; nor can the contacts of its subsidiary, CSXT, with Mississippi be attributed to CSX Corp. to create personal jurisdiction. The Amended Complaint against CSX Corp. should, therefore, be dismissed.

The complaint adds a series of alleged safety-related duties that CSXT is said to have violated: supposed duties regarding train operations, (*id.* ¶¶ 36-39); failure to inspect and repair unsafe crossing, (*id.* ¶¶ 40-43); and failure to report unsafe conditions, (*id.* ¶¶ 51-54).

The complaint asserts common law claims of negligence, gross negligence, (*id.* ¶¶ 35-54) and “Intentional Disregard For Public Safety,”³ (*id.* ¶¶ 60-64) and seeks compensatory and punitive damages.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) requires a plaintiff “to provide . . . ‘more than labels and conclusions’” to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). A plaintiff must present “a claim to relief that is plausible on its face.” *Id.* at 570. Plausibility requires more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Aschcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

When confronting a motion to dismiss, a reviewing federal court examines the operative complaint and rejects “pleadings that . . . are no more than conclusions” as “not entitled to the assumption of truth.” *Id.* at 679. It then determines whether the remaining factual allegations “plausibly give rise to an entitlement to relief.” *Id.* “Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555 (citations omitted). “Conversely, ‘when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum

³ “Intentional Disregard for Public Safety” is not a recognized cause of action as we understand law. Count Three should thus be dismissed for this independent failure to state a claim.

expenditure of time and money by the parties and the court.’” *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citation, internal quotation marks and original alterations omitted).

Doctrines of federal preemption are rooted in the Supremacy Clause of the United States Constitution: “[T]he laws of the United States . . . shall be the supreme law of the land; . . . anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl.2. “Because federal law is the supreme law of the land, it preempts state laws that ‘interfere with, or are contrary to, federal law.’” *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002) (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985)). Preempted claims are subject to threshold dismissal. *See, e.g., Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 843 (E.D. Ky. 2004).

ARGUMENT

The complaint alleges that CSXT violated a litany of supposed duties with respect to the operation of its train, as well as the inspection, repair, and maintenance of a rail crossing. Under two separate bodies of federal rail regulation, these claims are preempted and should be dismissed. To the extent plaintiffs challenge the configuration, physical characteristics and maintenance of the Main Street rail crossing, the claims are preempted by ICCTA. To the extent plaintiffs premise their tort claims on supposed duties of safety beyond those established by FRA rail safety regulations, the claims are preempted by the FRSA. Moreover, preemption aside, plaintiffs have failed to state a plausible claim for relief.

I. ICCTA Preempts Plaintiffs' Effort Through Tort Law to Regulate Rail Transportation.

Congress enacted ICCTA and created the Surface Transportation Board to regulate rail transportation in the United States, and “to implement a federal scheme of minimal regulation for this intrinsically interstate form of transportation.” *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 804 (5th Cir. 2011) (citation, internal quotation marks and original alteration omitted). ICCTA granted the STB exclusive jurisdiction 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.

49 U.S.C. § 10501(b). With ICCTA, Congress expressly and categorically preempted state law “regulation of rail transportation.” *Id.* “It is difficult to imagine a broader statement of Congress’ intent to preempt regulatory authority over railroad operations” than ICCTA. *CSX Transp. v. Ga. Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). ICCTA’s preemptive reach “is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.” *Friberg*, 267 F.3d at 443.

Rail crossings meet ICCTA’s definition of “transportation.” They are “facilities” and “property” where “tracks are located,” and are “related to the movement of passengers or property” by rail. 49 U.S.C. § 10501(b); *In re Katrina Canal Breaches Consol. Litig.*, Civ. A. No. 05-4182, 2007 U.S. Dist. LEXIS 95799, at *123–*124 (E.D. La. Dec. 27, 2007) (“There can be no doubt that a railroad crossing constitutes ‘property . . . related to the movement of passengers or property . . . by rail.’”); *see also* 49 U.S.C. § 10102(9)(A) (defining

“transportation” to include any “facility, instrumentality, or equipment of any kind related to the movement of passengers or property”).

Design, construction and maintenance of a railroad crossing are covered by ICCTA:

The design and construction of a railroad crossing is necessarily inextricably intertwined with the design and construction of the railroad tracks located at the crossing. Additionally, the design and construction of the railroad crossing relates directly to CSXT’s rail activity at the crossing. ICCTA makes it clear that the Surface Transportation Board has exclusive jurisdiction over the “construction” of railroad tracks.

In re Katrina, 2007 U.S. Dist. LEXIS 95799, at *125; *Waubay Lake Farmers Ass’n v. BNSF Ry. Co.*, CV No. 12-4179, 2014 WL 4287086, at *6 (D.S.D. Aug. 28, 2014) (complaint allegations that railroad had a duty to maintain, alter and construct its facilities of a sufficient capacity to carry off surface waters was an attempt to “‘manage or govern’ how [the railroad] constructs its roadbed and operates its tracks . . . fall[ing] squarely within the express terms of the ICCTA’s preemption clause.”).

Courts within the Fifth Circuit have applied ICCTA to preempt state law tort claims that have the effect of dictating how a railroad should run its rail transport operations, including in how a railroad manages and maintains rail crossings. Typical is *In re Katrina*, where plaintiff property owners of New Orleans sued, alleging that CSXT was negligent in its design and construction of a railroad crossing, resulting in flooding of their properties. In finding the complaint’s state law claims preempted by ICCTA, the court held that the “construction of a railroad crossing is necessarily inextricably intertwined with the design and construction of the railroad tracks located at the crossing.” *Id.* at *125. The court found further that “design and construction of the crossing relates directly to CSXT’s rail activity at the crossing.” *Id.* Granting

a motion to dismiss, the court found crossing-related allegations of this sort for the STB to resolve, not a court applying state tort law. *Id.*

Other courts find likewise when faced with like allegations in a complaint. *See, e.g., Pere Marquette Hotel Partners, LLC v. United States*, No. 09-5921, 2010 WL 925297, at *4-*6 (E.D. La. Mar. 10, 2010) (holding ICCTA preempts state negligence claims alleging negligent design and construction of railroad crossings, tracks, and roadbeds); *Suchon v. Wis. Cent., Ltd.*, No. 04-C-0379-C, 2005 WL 568057, at *3-*4 (W.D. Wis. Feb. 23, 2005) (holding ICCTA preempts nuisance action brought against railroad for vibrations and fumes affecting neighboring business since the action would have had the effect of regulating railroad routes or practices); *Maynard*, 360 F. Supp. 2d at 843 (holding ICCTA preempts negligence claims relating to loss of use of property and diminution of property value where claims are premised on “construction and/or maintenance of the tracks and crossings”); *Thomas Tubbs, et al. – Pet. for Declaratory Order*, STB. No. FD 35792, 2014 WL 55 08153, *1 (October 29, 2014) (finding preempted by ICCTA claims under Missouri state law seeking compensation from railroad for flooding and property damage allegedly caused by improper design, construction, and maintenance of rail line and support structures); *Waubay Lake Farmers Ass’n*, 2014 WL 4287086, at *6 (holding preempted by ICCTA claims for damages resulting from allegedly negligent design and construction of a culvert running beneath a track and railroad’s alleged failure to maintain its facilities).

As the case authorities and Congress’s statutory language make plain, ICCTA prohibits state law from being used to “manage or govern” how a railroad designs, configures, operates or maintains its facilities. *Id.* (internal citation omitted). The complaint here seeks to accomplish just that. The complaint alleges that the crossing’s geometrical configuration, incline, grade, and

shape should have been constructed or configured differently, and that operation of a train through a crossing with this one's physical characteristics is a violation of state tort law. Am. Compl. ¶ 25 (the Biloxi crossing "is a dangerous and severely inclined or 'humped' crossing"); *id.* (the crossing is "dangerous" due to "automated CSX railroad maintenance practices"); *id.* ¶ 44 ("The Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad" in creating a "severe incline or 'hump'"); *id.* ¶ 45 (CSXT "should not be allowed to build up the crossing surface above the same level plane of the intersecting roadway"); *id.* ("[B]oth approaches to the Subject Crossing were at an inappropriate incline to the crossing surface."); *id.* ¶ 46 ("[t]he humped condition rendered the Main Street Crossing unsafe for motorists and extra-hazardous, ultra-hazardous, and unusually dangerous"). These allegations can only be understood as asserting that CSXT should have altered the configuration, operation, and maintenance of the Biloxi crossing and related rail and structures, or should cease its operations over the crossing, or both. The complaint thus seeks, through tort law, to regulate CSXT's treatment of the Biloxi crossing by managing a railroad's decisions on how to run crossing-related aspects of its rail operations. This ICCTA preempts.

Plaintiffs cannot claim they seek anything different than regulation because the complaint seeks punitive damages. Am. Compl. ¶¶ 54, 59, 64. "To allow [plaintiffs] to seek and recover punitive damages in a state court is to allow almost unlimited state 'regulation.'" *S.D. ex rel. S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 934 (D.S.D. 2003).

If permitted to proceed, this action would thus "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting ICCTA. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981)

(citation and internal quotation marks omitted). Because ICCTA prohibits this, the crossing-related allegations against CSXT should be dismissed.

II. The FRSA Preempts Plaintiffs' Effort Through Tort Law To Supplement CSXT's Rail Safety Obligations.

The complaint's claims against CSXT are independently preempted by the FRSA, in two respects. First, insofar as plaintiffs seek to impose duties on CSXT beyond the FRA regulations they cite with respect to inspecting and repairing crossings, those claims defy federal rail safety law. Second, plaintiffs' claims are preempted to the extent they would expand the scope of cited FRA regulations beyond their stated terms.

Congress enacted the FRSA, 49 U.S.C. §§ 20101, *et seq.*, “to promote safety in every area of railroad operations and to reduce railroad-related accidents.” 49 U.S.C. § 20101. The FRSA vests in the Secretary of Transportation broad powers to prescribe regulations for “*every area* of railroad safety.” *Id.* § 20103(a) (emphasis added). In enacting the FRSA, Congress sought nationwide uniformity in the area of rail safety: “[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.” *Id.* § 20106(a)(1).

In 2007, Congress amended the FRSA's preemption provision to clarify that while the FRSA bars states from imposing obligations in addition to or inconsistent with federal regulations, the FRSA does not preempt state tort claims premised on a rail defendant's alleged failure to comply with existing federal rail safety regulations or internal standards created pursuant to existing federal regulations. *See id.* § 20106(b)(1).

Therefore, with limited exceptions not applicable in the instant case, a state law or suit is preempted by the FRSA when the Act's implementing regulations (a) “cover” or “substantially subsume” the subject matter of the state law or action unless (b) plaintiff sufficiently alleges

failure to comply with those regulations. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 661, 675 (1993) (maximum railroad-speed regulations “cover” the subject matter of train speed and therefore preempt a jury verdict that a train was traveling at excessive speed); *Nickels v. Grand Trunk W. R.R., Inc.*, 560 F.3d 426, 430-31 (6th Cir. 2009) (federal regulation “substantially subsumes the issue of ballast size” and thus preempts claim based on injury allegedly caused by walking on oversized track ballast); *Baker v. Canadian Nat’l/Ill. Cent. Ry. Co.*, 397 F. Supp. 2d 803, 814 (S.D. Miss. 2005) (claim of excessive speed preempted by FRSA).

Here, supposed duties that plaintiffs claim CSXT has violated come in four categories: train operations (Am. Compl. ¶¶ 36-39); failure to inspect and repair unsafe crossing (*id.* ¶¶ 40-43); unsafe crossing conditions (*id.* ¶¶ 44-50); and failure to report unsafe conditions (*id.* ¶¶ 51-54). Each, however, is subsumed by the overarching safety-related purposes of the FRSA, and by FRA regulations in fact in place. *See, e.g.*, 49 C.F.R. § 218.1 (“This part prescribes minimum requirements for railroad operating rules and practices.”); *id.* § 213.235 (inspection of track crossings); *Easterwood*, 507 U.S. at 671 (“The Secretary’s regulations [at 23 C.F.R. § 646.214] cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.”).

While the complaint cites allegedly applicable federal regulations covering crossing inspection (Am. Compl. ¶ 40), it fails to do so as to any other aspect of its charges against CSXT. CSXT, and this Court, are thus left to speculate as to which regulations CSXT is supposed to have violated. In the main, what plaintiffs allege are common law claims untethered to any federal standard. Typical is the complaint’s allegation that CSXT failed “to travel at a speed that allowed the train to stop in time to avoid the Collision,” *id.* ¶ 37(c): Plaintiffs identify no applicable federal regulation violated by CSXT, much less how it might have been violated.

This lack of specificity continues across the complaint. Plaintiffs allege poor train handling but fail to provide a shred of detail or fact as to what was poor about it. Plaintiffs cite supposed failure of the crew to look out and back, again without facts alleged as to what the crew should have done differently. Plaintiffs speak of a desire for the train to have slowed, a claim barren again of facts. Plaintiffs cite FRA regulations without explaining why they are cited nor how the regulations were supposedly violated. This is not acceptable in the case of rail safety operations, where Congress has spoken and has sought nationwide uniformity and a federal hand in specifying duties owed by rail entities. Where claims are subsumed by federal regulations but no noncompliance is alleged, a complaint is insufficient to put CSXT on notice of its failure to comply with the regulation subsuming the claim, and therefore does not give CSXT “fair notice of what the claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (omissions in original and internal quotation marks omitted)). Such claims should be dismissed.

Above and beyond pleading deficiencies, rail safety contentions are not sufficiently pled where they are not tied to any statutory or regulatory authority. Where plaintiffs would have this Court impose obligations on CSXT through Mississippi tort law irrespective of, and in conflict with, requirements established by the FRA, such claims defy Congressional intent to create a nationally uniform set of standards applicable to railroads and are preempted. *Easterwood*, 507 U.S. at 675.

Finally, to the extent plaintiffs attempt to impose additional obligations based upon CSXT’s own rules, those claims can only survive if based on an internal rule “created pursuant to a regulation.” 49 U.S.C. § 20106(b)(1)(B); *Rawls v. Union Pac. R.R.*, No. 1:09–cv–01037, 2011 WL 2784427, at *4 (W.D. Ark. Feb. 22, 2011) (“internal rules not created pursuant to a

regulation or order” are “not a bar to preemption”). Plaintiffs’ claims based on alleged violations of CSXT’s own rules are therefore insufficient for the same reasons as their other claims: they fail to identify any federal regulation that is being violated via the alleged noncompliance with internal rules. “It is insufficient to allege a violation of [a railroad’s] own rules without citing to any applicable federal regulation *mandating* these rules.” *Prentice v. Nat’l R.R. Passenger Corp.*, Case No. 12–cv–05856–MEJ, 2014 WL 3868221, at *10 (N.D. Cal. Aug. 6, 2014) (citation omitted) (emphasis added). Plaintiffs have not, and these claims should likewise be dismissed.

The complaint’s allegations against CSXT thwart Congressional intent in asking a court to usurp the role of the FRA when it comes to rail safety. As such, the rail safety claims against CSXT are preempted.

III. The Complaint Fails To State Any Facially Plausible Claim For Relief.

As suggested above in establishing CSXT’s preemption defenses, the complaint fails because it fails to state any “facially plausible” claim against CSXT. “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556); *see also Seahorn Invs., LLC v. Fed. Ins. Co.*, 2014 U.S. Dist. LEXIS 133522, 10 (S.D. Miss. Sept. 23, 2014) (“[A] plaintiff must set forth specific facts, not conclusory allegations.”). In contrast, a “pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted).

A review of the complaint reveals that the categories of purported allegations against CSXT ultimately “amount to nothing more than conclusory assertions . . . with no real factual support.” *Git-R-Done Prods. v. Giterdone C Store, LLC*, NO. 1:15CV386-LG-RHW, 2016 U.S. Dist. LEXIS 14328, *6-*7 (S.D. Miss. Feb. 5, 2016) (citation omitted). Much of this is shown above, and the “Train Operations” allegations are emblematic of this failing. *See* Am. Compl. ¶¶ 36-39. The complaint sets forth no facts plausibly establishing *how* CSXT was negligent in any of the alleged respects, or *how* such negligence caused the plaintiffs’ harm. The same is true for the other categories of alleged misconduct. Accordingly, as in *Git-R-Done Prods.*, the claims against CSXT should be dismissed for the additional reason that they fail to state any facially plausible claim for relief.

CONCLUSION

Respectfully, the claims against CSXT are preempted and otherwise fail to state any facially plausible claim for relief and should be dismissed.

This the 18th day of April, 2017.

Respectfully submitted,

CSX CORPORATION

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CERTIFICATE OF SERVICE

I, Patrick R. Buchanan, do hereby certify that I have this day electronically filed a true and correct copy of the foregoing pleading with the Clerk of Court using the ECF system which sent notification to such filing to the following:

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This the 18th day of April, 2017.

/s/Patrick R. Buchanan

PATRICK R. BUCHANAN

Exhibit 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

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

PLAINTIFFS

v.

CIVIL ACTION NO. 1:17-cv-00106-HSO-JCG

**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

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO
DEFENDANT CSX TRANSPORTATION INC.’S MOTION TO DISMISS**

COMES NOW, Plaintiff, by and through counsel, and for their Memorandum in Support of Their Response in Opposition to Defendant CSX Transportation Inc. (“CSXT”) Motion to Dismiss offers the following:

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INTRODUCTION

SUMMARY OF THE ARGUMENT

On March 7, 2017, Plaintiff was seriously injured when the bus she was riding in became stuck on a highway-railroad grade crossing (hereinafter the “Main Street Crossing”) and was struck by a CSXT train. Plaintiffs subsequently filed suit alleging, among other entities, CSXT’s negligence caused this collision and Plaintiff’s injuries.

CSXT’s motion seeks to improperly truncate the litigation process by raising summary judgment affirmative defense arguments through its motion to dismiss. First, taking all Plaintiffs’ allegations as true, her claims are not barred by the Interstate Commerce Commission Termination Act (“ICCTA”) preemption because Plaintiffs’ negligence claims against CSXT are for improper maintenance and operation. Plaintiffs’ Complaint explicitly states they are not making any claims regarding the design or construction of the railroad-highway grade crossing. (Doc. 7 at ¶ 49.) Rather, Plaintiffs’ allegations against CSXT are, in pertinent part, related to improper maintenance of the highway-railroad grade crossing. (Doc. 7 at ¶ 16.) Second, the 2007 Preemption Clarification Act, 49 U.S.C. § 20106 makes clear Plaintiffs’ claims are not completely barred by Federal Railroad Safety Act (“FRSA”) preemption when, as Plaintiffs have here, the claims are based on violations of a federal standard of care established by federal regulations, CSXT internal rules, or a State law, order, or regulation not incompatible with federal law. *See* 49 U.S.C. § 20106. At the very least, at this early stage in litigation, discovery is necessary before ICCTA and FRSA preemption affirmative defenses are ripe for this Court’s determination. Last, pursuant to the notice pleadings requirements which have existed since 1938, and as clarified by the United States Supreme Court, Plaintiffs’ Complaint satisfies the requirements of Rule 8(c) of the Federal Rules of Civil Procedure. Thus, for the reasons set forth

herein, this Court should deny CSXT's Motion to Dismiss.

STATEMENT OF THE FACTS

This is a negligence action brought under Mississippi tort law. Plaintiff was a passenger on a tour bus which was struck by a train at a highway-railroad grade crossing in Biloxi, Mississippi. CSXT is the owner and operator of the track, the crossing, and the train. All of the claims alleged in the Complaint are grounded in negligence or intentional tort, both of which are time-honored creatures of Mississippi common law. Plaintiffs' Complaint alleges in detail duties under federal law, internal rules, and State statutory and common law which CSXT breached, resulting in Plaintiffs' injuries. Plaintiffs' Complaint does not seek to directly regulate economic activity of CSXT. Rather, Plaintiffs seek compensatory tort damages and punitive damages as those damages are defined by Mississippi law.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim "is viewed with disfavor and is rarely granted." *Belanger v. GEICO Gen. Ins. Co.*, 623 Fed. Appx. 684, 686 (5th Cir. 2015). Rule 8 does not require "detailed factual allegations but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Gulf Coast Hotel-Motel Assn v. Miss. Gulf Coast Golf Assn*, 658 F.3d 500, 504-06 (5th Cir. 2011.) Thus, a complaint will survive a motion to dismiss if it contains "enough facts to state a claim to that relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff meets this standard when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In a motion to dismiss, Courts must accept as true all allegations in the Complaint as well

as reasonable inferences to be drawn therefrom. *Leatherman v. Tarrant Co. Narcotics Unit*, 507 U.S. 163, 164 (1993); *Brand Coupon Network L.L.C. v. Catalina Marketing Corp.*, 748 F.3d 631, 634 (5th Cir. 2014.) The Court must “accept all well-pleaded facts as true...in the light most favorable to the Plaintiff.” *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010.)

A well-pleaded complaint may proceed even if it strikes the court that actual proof of the asserted facts is improbable, and that recovery is unlikely. *Twombly*, 550 U.S. at 556. The plausibility standard “does not give district courts license to look behind [a complaint's] allegations and independently assess the likelihood that the plaintiff will be able to prove them at trial.” *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 803 n. 44 (5th Cir. 2011). The ultimate question to be resolved is “whether [the] complaint was sufficient to cross the federal court's threshold.” *Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289, 1296 (2011). A complaint is insufficient if it merely “tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (citations omitted). However, “[a] claim has facial plausibility when the plaintiff pleads the factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Twombly*, 550 U.S. at 570. Assessing whether a complaint states a plausible claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 664.

Regarding motions to dismiss based on affirmative preemption defenses, courts have consistently held preemption is highly disfavored. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2261 (2013). There is a strong presumption against federal preemption. *Wyeth v. Levine*, 555 U.S. 555 (2009); *Cipollone v. Liggett Groups, Inc.*, 505 U.S. 504 (1992). This presumption against preemption is even stronger when preemption displaces the historic power of the states to protect the health and safety of their citizens, such as tort remedies to compensate

for personal injuries. *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 144 (1963). When preemption of common law claims leave injured individuals without any state or federal remedy, a court may find preemption only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

II. CSXT IS IMPROPERLY ATTEMPTING TO TRUNCATE THE LITIGATION PROCESS BY RAISING SUMMARY JUDGMENT PREEMPTION ARGUMENTS AT THE PLEADING STAGE

1. Plaintiffs' Claims Are Not Completely Preempted by the ICCTA

Plaintiffs' claims against CSXT are not completely preempted by the ICCTA because Plaintiffs' claims do not attempt to regulate rail transportation or the design or construction of the railroad. CSXT's motion incorrectly, but purposefully, encapsulates Plaintiffs' allegations regarding the crossing as an improper crossing design or construction claims so it can assert ICCTA preemption. However, Plaintiffs have not and never will make an improper design or construction claim. Rather, Plaintiffs' claims concerning the crossing are improper maintenance allegations. As paragraph 49 of Plaintiffs' Complaint specifically states:

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.

(Doc 7 at ¶ 49) (emphasis added.) Moreover, there is a complete lack of congressional intent for the ICCTA to preempt routine crossing collision cases, such as this case. Nor is Plaintiffs' Complaint seeking to regulate the economic activity of rail transportation. Last, numerous courts are in agreement that the ICCTA does not preempt similar allegations of inadequate maintenance in routine crossing collision cases. As such, CSXT's motion to dismiss should be denied.

A. The Strong Presumption Against Preemption of State Tort Remedies Precludes Interpreting the ICCTA's Express Preemption Clause as Preempting Plaintiffs' Remedies

There is a strong presumption against interpreting the ICCTA as preempting the Plaintiffs' causes of action under Mississippi law, whether as a substantive defense in the form of conflict preemption, or as an assertion of federal jurisdiction under the doctrine of complete preemption. The Supreme Court has consistently instructed that a defendant claiming federal preemption in any form must overcome a strong presumption in favor of preserving state law in areas of traditional state responsibility. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 n.2 (2009). In particular, as the Supreme Court has made clear, "we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers—are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000). Of particular relevance for this case, the Supreme Court long ago observed that "[t]he care of grade crossings is peculiarly within the police power of the states." *Lehigh Valley R.R. Co. v. Bd. Of Pub. Util. Comm'rs*, 278 U.S. 24, 35 (1928) (citations omitted); *Faulk v. Union Pac. R.R. Co.*, 2011 U.S. Dist. LEXIS 20468 at *4-*5 (W.D. La. 2011), *vacated on unrelated grounds regarding Louisiana statutory interpretation*, *Faulk v. Union Pac. R.R. Co.*, 449 Fed. Appx. 357 (5th Cir. 2011). If a railroad crossing presents a danger to the public, "reasonable care must be taken to eliminate [the danger]. And the police power may be exerted to that end." *Id.* at 34; *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 333 (5th Cir. 2008).

Equally pertinent when addressing the ICCTA in the context of federal preemption, the Supreme Court has emphasized that the presumption against preemption is at its strongest where

federal preemption would leave the injured plaintiff with no remedy at all, even where Congress otherwise intended broad preemption. For example, *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983), held that Congress intended to occupy the field of safety regulation of nuclear power facilities. Nevertheless, the Court held the following year that the preempted field did not extend to state tort actions for injury caused by negligent administration of safety regulations. In *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984), noting “Congress’ failure to provide any federal remedy for persons injured,” Justice White, writing for the majority, concluded that Congress could not have intended to preempt state tort causes of action. “It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.” *Id.* at 251. Justice Blackmun, in his dissent, agreed with the majority on this point: “The absence of federal regulation governing the compensation of victims . . . is strong evidence that Congress intended the matter to be left to the States.” *Id.* at 264 n.7 (Blackmun, J., dissenting).

The Court restated that same principle in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Rejecting the company’s assertion that the scope of Congress’ express preemption of state standards in the federal Medical Device Amendments extended to state causes of action for personal injury, Justice Stevens wrote for the plurality: For Congress to have eliminated that right for those injured by unreasonably dangerous medical devices, without mention of such a drastic step, would have been “spectacularly odd.” *Id.* at 491. *See also Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (“If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”).

Here, § 10501(b) of the ICCTA makes it considerably less than “manifestly clear” that Congress intended the preemption of “remedies provided under Federal or State law” to include tort remedies for personal injury. To the contrary, the ICCTA fails to provide redress for Plaintiffs’ personal injuries. The ICCTA does not create a federal remedy for tort actions. *Trejo v. Union Pac. R.R. Co.*, No. 3:10CV00285 JLH, 2011 U.S. Dist. LEXIS 8676 at *12-*16. (E.D. Ark. 2011). Absent manifestly clear evidence of such Congressional intent, the comprehensive and “extraordinary” preemptive force required for ICCTA complete preemption to apply is lacking. This lack of congressional intent is ever more transparent in the context of ICCTA preemption because it would “remove all means of judicial recourse for those injured by illegal conduct,” a point that the United States Supreme Court found difficult to countenance as an intent of Congress. *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 251 (1984). Therefore, CSXT’s motion to dismiss must be denied.

B. Congress Enacted the ICCTA to Preempt State Law Imposing Economic Regulation on Railroad and Plaintiffs’ Complaint Does Not Attempt to Regulate Railway Transportation in Economic Realm

Through the ICCTA, Congress made the economic regulation of the rail transportation system the Surface Transportation Board’s principal function. The ICCTA’s legislative history makes clear that Congress intended to preempt only state law imposing economic regulation:

Section 10103. Remedies are exclusive

[This section of the Act] is conformed to the bill’s direct and general pre-emption of State jurisdiction over *economic regulation* of railroads.

* * *

The bill is *intended to standardize all economic regulation* (and deregulation) of rail transportation under Federal law . . .

Section 10301. General jurisdiction

This provision replaces the railroad portion of former Section 10501 . . . The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of *occupying the entire field of economic regulation* of interstate rail transportation. Although *States retain the police powers reserved by the Constitution*, the federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.

H.R. Rep. No. 104-311 at 95-96 (1995) *reprinted in* 1995 U.S.C.C.A.N. 793 at 807-08 (emphasis added). *See also* H.R. Conf. Rep. No. 104-422 at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850 at 852 (“The Conference provision retains this general rule, while clarifying that the *exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally.*”) (emphasis added); *Fayus Enterprises v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010) (“the core of ICCTA preemption is ‘economic regulation’”).

Tort liability is not economic regulation in the sense contemplated by the ICCTA. A liability judgment in favor of the Plaintiffs would command CSXT to pay only the damages awarded. While it is true that a desire to avoid future liability provides a financial incentive to adopt safer practices, such an indirect influence on private decision making is not equivalent to direct regulation by the State. The Supreme Court has made this distinction clear, even in the area of nuclear power, which is subject to heavy federal regulation:

The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional [damages] award provision. . . . We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185-86 (1988). Shortly thereafter, the Court reaffirmed the principle that preemption of state regulation does not generally preempt state tort causes of action, even though a tort award imposes an economic consequence on a defendant:

We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on [employers'] decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. . . . Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.

English v. General Elec. Co., 496 U.S. 72, 85 (1990).

What's more, Congress removed all doubt that the responsibility given to the STB over economic regulation does not encompass regulation of safety matters by enacting the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 *et seq.*, to regulate the safety of the railroad industry. The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. To that end, Congress has directed the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103. Those safety regulations are administered and enforced by the Federal Railroad Administration (FRA), not the STB. In a Notice of Proposed Rulemaking concerning Safety Integration Plans (SIPS) for use by the STB in railroad consolidations and mergers, the FRA and STB wrote a joint introduction that describe their respective roles in railroad regulation:

Under Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation and delegated to the Federal Railroad Administrator.

* * *

FRA has expertise in the safety of all facets of railroad operations. Concurrently, the [STB] has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of railroads complement each other's interest in promoting a safe and viable industry.

Joint STB/FRA Notice of Proposed Rulemaking, 63 FR 72225, 72225-226, 1998 WL 906180 (Dec. 31, 1998)(citations omitted). While the STB is required as a matter of policy to take safety

into consideration in its regulation of economic issues, it does so in consultation with the FRA, which is vested with the primary expertise and authority over railroad safety.

The Sixth Circuit discussed the interplay between the STB and the FRA in *Tyrell v. Norfolk Southern Ry Co.*, 248 F.3d 517 (6th Cir. 2001). “[T]he agencies’ complementary exercise of their statutory authority accurately reflects Congress’s intent for the ICCTA and FRSA to be construed *in pari materia*.” *Id.* at 523. With the benefit of amicus briefs filed by both the STB and the United States, the *Tyrell* court held that because an Ohio regulation that addressed track clearance measurements “has a connection with rail safety based on its terms, the safety benefits of compliance, and its legally recognized purpose, FRSA provides the applicable standard for assessing federal preemption.” *Id.* at 524. The federal preemption defense was therefore analyzed under the FRSA, not the ICCTA, even though the Ohio regulation impacted track construction and had an economic impact on the railroad. The STB has explicitly approved the *Tyrell* court’s analysis of the interplay between the ICCTA and the FRSA in its own subsequent rulings. See *CSX Transportation, Inc. – Petition for Declaratory Order*, No. 34662, 2005 WL 584026 at *8 (S.T.B. Mar. 14, 2005), *aff’d on reconsideration*, 2005 WL 1024490 at *5 (S.T.B. May 3, 2005).

Likewise, here, Plaintiffs are not seeking to directly attempt to manage the railroad’s decisions in the economic realm. Plaintiffs’ Complaint may have a mere “remote or incidental effect on rail transportation,” but that alone does not justify the imposition of ICCTA preemption. *Elam*, 635 F.3d at 805 (quoting *Franks*, 593 F.3d at 410). Whether some of the Plaintiffs’ negligence claims against CSXT are ultimately found to be preempted by the FRSA under a defense preemption analysis is not a question before the Court at this time. As discussed more fully below, discovery is required before the Court can fully analyze these affirmative

defenses. Therefore, when as is true here, Plaintiffs' Complaint merely has some incidental effect on rail transportation, ICCTA complete preemption is inappropriate.

C. Numerous Courts Have Held Routine Crossing Collisions Cases, Such as this One, Are Not Preempted by the ICCTA

Binding 5th Circuit precedent has held that “[a] typical negligence claim seeking damages for a typical accident (such as the Elams’ simple negligence claim) does not directly attempt to manage or govern a railroad’s decisions in the economic realm.” *Elam, v. K.C.S. Ry. Co.*, 635 F.3d 796, 813 (5th Cir. 2011). All cases cited by CSXT deal directly with the contraction of railroad tracks, typically in a water runoff setting. (Doc. 10 at 5-6.) Rather, here, typical negligence cases only have an incidental effect on railway operations, and are not aimed at them directly. *Elam*, 635 F.3d at 813. The *Elam* Court rejected Kansas City Southern’s claim of unreasonable burden and implied preemption, noting that no proof at all was provided the courts that providing proper warnings at the particular site of the accident would be unreasonably burdensome. *Id.* at 814. Like *Elam*, CSXT has provided no proof regarding the proper maintenance of the Main Street rail crossing. As in *Elam*, this Court should likewise determine CSXT has not met its burden of proof to establish implied preemption under a Rule 12(b)(6) standard of review.

The overwhelming majority of cases in this district have concluded ICCTA preemption is inappropriate in typical negligence claims seeking damages for accidents. See *New Orleans & Gulf Coast Railway Company v. Barrois*, 533 F.3d 321, 337-38 (5th Cir. 2008) (finding that that railroad crossings do not fit within the definition of transportation under the ICCTA); *Union Pacific .R.R. Co. v. Louisiana Public Service Commission*, 722 F. Supp. 2d 699 (M.D. La. 2010) (typical disputes regarding rail crossings are not in the nature of regulation governed by the STB pursuant to the ICCTA); *Battley v. Great Western Cas. Inc. Co.*, No. 14-494, 2015 U.S.Dist.

LEXIS 35170 at *4-*5 (M.D. La. 2015) (holding a tort claim for the railroad engineer’s refusal to move a train blocking a crossing is not preempted by the ICCTA); *Anderson v. Union P. Ry. Co.*, No. 10-cv-193, 2011 U.S. Dist. LEXIS 108076, at *11-13 (M.D. La. 2011) (holding that ICCTA preemption is not appropriate because the “plaintiffs’ claim that they suffered personal injuries as the result of defendant’s negligent maintenance and construction of the railroad bridge crossing do not equate to state economic regulation of railroads.”)

While not binding on this Court, several other federal jurisdictions have similarly concluded that the ICCTA does not completely preempt a plaintiff’s’ negligence claims in a crossing accident. *See Rawls v. Union P. Ry. Co.*, No. 1:09-cv-01037, 2012 U.S. Dist. LEXIS 94972 at *15 (W.D. Ark. 2012) (in a crossing accident case, improper maintenance claims which resulted in a severely inclined or humped crossing is not completely preempted by the ICCTA); *Trejo v. Union Pac. R.R. Co.*, No. 3:10-cv-00285 JLH, 2011 U.S. Dist. LEXIS 8676, 2011 WL 309614 (E.D. Ark. Jan. 28, 2011) (claims based on inadequate safety at a crossing are not preempted by the ICCTA); *Watkins v. RJ Corman R.R.*, No. 7:09-114-KKC, 2010 U.S. Dist. LEXIS 41244 at *8-*9 (E.D. Ky. Apr. 27, 2010) (ICCTA does not provide a federal cause of action that supersedes state-law negligence actions); *Staley v. BNSF Railway Co.*, No. CV14-136, 2015 U.S. Dist. LEXIS 24275 at *17 (D. Mt. 2015) (holding that where tort claim focuses on allegations of negligent conduct in a crossing accident, such a claim has “at best” an incidental effect on train operations, thus ICCTA preemption is inapplicable, and adopting *Elam’s* precedent); *Cf. Allied Indus. Dev. Corp.*, 2010 U.S. Dist. LEXIS 37540, 2010 WL 1524469, *1 n.1 (N.D. Ohio 2010) (“If the contrary were true, as the defendants argue, then the scope of ICCTA preemption would be staggering, sweeping away state contract, tort, and property law. Indeed, it is difficult to imagine a state law that could not, in some circumstance,

incidentally” affect railroad transportation).

In sum, the ICCTA, a statute regulating economic activity, is not unreasonably interfered with or unduly burdened with the prospect of injured parties seeking redress for injuries for the particular set of circumstances that caused their injury. As courts applying reason and human instinct have held, it is impossible to countenance that Congress would have freely stripped injured persons of any meaningful right to recover for their injuries from local courts through passage of an economic statute, when the federal safety statute, 49 U.S.C. 20101 *et seq.* specifically permits such tort suits. For both legal and logical reasons, CSXT’s ICCTA preemption argument completely falls apart, and this Court should deny any motion to dismiss on ICCTA preemption grounds.

2. Plaintiffs’ Claims are Not Preempted by the FRSA

CSXT’s motion ignores statutory language and caselaw in an effort to resurrect a quasi-complete FRSA preemption argument despite clear congressional intent to the contrary. *See* 49 U.S.C. § 20106; *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 690 (8th Cir. 2008). In attempting to do so while have to acknowledge § 20106, CSXT improperly attempts to substitute possible summary judgment arguments for faulty pleading arguments. A motion to dismiss tests the legal sufficiency of a complaint and is not intended to determine issues of ultimate fact. A motion to dismiss may not act as a substitute for summary judgment.

In typical cursory fashion, CSXT asserts each of Plaintiffs’ claims are “subsumed by overarching safety related purposed of the FRSA, and by FRA regulation in fact in place.” (Doc. 10 at 10.) In making this bold assertion, CSXT ignores Plaintiffs’ well-pled complaint which makes allegations against CSXT pursuant to 49 U.S.C. § 20106 for violations of a federal standard of care created by federal regulation CSX internal rules and regulations. (Doc 7 at ¶

16.) CSXT also conveniently overlooks § 20106(b)(1)(C) which allows Plaintiffs to seek damages for personal injuries when it is alleged the railroad violated a State law, regulation or order (including common law), which is not incompatible with § 20106(a)(2).

CSXT's motion as it relates to the FRSA asks this Court to weigh facts and determine the factual sufficiency of every count in Plaintiff's Complaint prior to Plaintiff's conducting any discovery. CSXT's numerous form arguments relating to the FRSA are affirmative defenses, which CSXT has the burden to prove. This cannot be done in proceedings on a motion to dismiss. Thus, CSXT's motion should be denied.

A. History of FRSA Preemption

Federal Railroad Safety Act (FRSA) preemption is outlined in 49 U.S.C. 20106(a)(1): "Laws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable." But the FRSA never preempted all state law causes of action. States can and always could "adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 177 (3d Cir. 2013) (quoting 49 U.S.C. § 20106(a)(2)). The Federal Safety Act does not provide a private cause of action for motorists whose only remedy is a common law tort action. *See Moses v. Union Pac. R.R.*, 64 F.3d 413, 418 (8th Cir. 1995). Even after federal regulations substantially subsume the subject matter of the relevant state law, states can and always could adopt or continue in force a "more stringent law" if necessary to eliminate a "local safety or security hazard." *Zimmerman*, 706 F.3d at 177 (quoting 49 U.S.C § 20106(a)(2)(A)).

The Supreme Court of the United States made clear that courts should be very cautious and slow to find federal preemption. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). The

Easterwood Court noted that preemption did not preclude claims for related torts, such as the failure to slow or stop a train to avoid specific, individual hazards. *Id.* at 675. Recognizing that the FRSA, together with state laws and standards “relating to railroad safety,” could coexist “to promote safety in all areas of railroad operations” and that these regulations support the position that a railroad has “joint responsibility” for safety at railroad crossings. *Id.* at 669.

Seven years after *Easterwood*, a sharply divided Supreme Court expanded the preemption of state tort claims alleging that adequate warning devices should have been installed at a crossing. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000). In *Shanklin*, federal funds had participated in the installation of crossbuck signs at that crossing after a diagnostic team determined such signs were adequate. Accordingly, the state law claims were preempted. The harsh reality of *Shanklin*’s majority’s opinion was “that state negligence law is displaced with no substantive federal standard of conduct to fill the void. That outcome defies common sense and sound policy.” *Id.* at 360-61 (Ginsburg J., dissenting). Justice Ginsburg went on to state that “[t]oday the railroads have achieved a double windfall: the Federal Government foots the bill for installing safety devices; and that same federal expenditure spares the railroads from tort liability, even for the inadequacy of devices designed only to secure the ‘minimum’ protection Congress envisioned for all crossings.” *Id.* Justice Breyer’s concurring opinion called for a legislative or regulatory fix by pointing out that the FRA “remains free to amend its regulations to achieve the commonsense result that the Government itself now seeks. With that understanding, I join the majority’s opinion.” *Id.* at 360

Following *Easterwood* and *Shanklin* there was a wide spectrum of decisions on how to apply FRSA preemption. Conflicting decisions ranged from those that continued to uphold the strong presumption against preemption to those that even further expanded FRSA preemption for

railroads. This expansionist view eventually manifested itself in two cases, where, for all practical purposes, the railroad was granted full immunity from negligence suits. *See Lundeen v. Canadian Pac. Ry. Co.*, 2007 WL 465703 (D. Minn., February 2, 2007); *Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006). However, Congress could not stand for this injustice. On August 3, 2007, Congress amended the FRSA preemption clause. (Pub. L. No. 110-52, § 1528). Congress amended 49 U.S.C. § 20106 to clarify that the FRSA could no longer be used to shield railroads from liability for harm resulting from violations of FRA standards, applicable state law, and internal railroad operating rules. The 2007 Preemption Clarification Amendment to 49 U.S.C. § 20106 reads as follows:

- (b) CLARIFICATION REGARDING STATE LAW CAUSES OF ACTION.
 - (1) Nothing in this section 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).

Subsection (a)(2) of 49 U.S.C. § 20106 specifically allows a state to adopt and enforce additional or more stringent law, regulation or order related to railroad safety or security when the law, regulation or order:

- (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
- (B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

This section directly addressed and legislatively overruled the trend towards an ever-expansive view of FRSA preemption. “The 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.” *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 690 (8th Cir. 2008); *see also* H.R. Conf. Rep. No. 110-259 (2007). This amended section demonstrates Congress’s legitimate fear that courts might blindly dismiss claims, such as claims based upon assertions of negligent inspection, negligent maintenance, negligent training, and negligent operation. *See Lundeen*, 532 F.3d at 697-88. The railroad industry attempted to limit the language of the 2007 Preemption Clarification Amendment.¹ But Congress rejected this attempt. Rejection of specific language and amendments may be considered, and are persuasive, in determining legislative intent. *People for Env’tl. Progress v. Leisz*, 373 F. Supp. 589, 592 (D.C. Cal. 1974).

The 2007 Preemption Clarification Amendment also clarifies that “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*, 706 F.3d at 178 (citing 49 U.S.C. § 20106(b)(1)(A-B)). If a railroad allegedly “violated either a federal standard of care or an internal rule that was created pursuant to a federal regulation,” a plaintiff’s claim avoids preemption. *Id.* An internal rule is created pursuant to a federal regulation when the rule is contemplated by the federal regulations. *See Skrovig v. BNSF Ry. Co.*, 855 F. Supp. 2d 933 (D.S.D. 2012). The amendment also makes clear that a plaintiff has the right to seek damages

¹ The AAR proposed language: “Nothing in this provision shall otherwise affect the scope or application of this section as interpreted by the U.S. Supreme Court in *Easterwood* and *Shanklin*.” *See* AAR Proposal, Amendment to Address Minot Litigation, April 4, 2007. In this case the Court will not be required to address whether the 2007 Preemption Clarification Amendment overturned *Shanklin*.

based on state law claims, as long as the state law is compatible with either of the original express exceptions to FRSA preemption. *See Zimmerman*, 706 F.3d at 178 (citing 49 U.S.C. § 20106(b)(1)(C)).

B. FRSA Preemption as an Affirmative Defense is Not Appropriate in a Motion to Dismiss

It is important to note the stage in litigation which the parties are at. CSXT has yet to file an answer in this case. No formal discovery has taken place. CSXT may well have an affirmative defense based on FRSA preemption. However, Plaintiffs are without any ability to refute that affirmative defense without conducting discovery on Plaintiffs' claims. A substantial amount, if not all, of the evidence needed to substantiate Plaintiffs' allegations are within the sole possession of CSXT or given to the National Transportation Safety Board ("NTSB") by CSXT. As a result, Plaintiffs are left in a "Catch-22" where they have no access to the specific information which would allow a more specific delineation of fact (such train crew operations or CSXT's improper maintenance), but are threatened with dismissal of the case because they cannot cite to those specific facts under CSXT and/or NTSB control. As an affirmative defense, a FRSA preemption argument is not appropriately brought before plaintiffs have had the ability to conduct sufficient discovery to refute those defenses. Therefore, CSXT's motion should be denied.

C. Plaintiffs' Complaint alleges negligence against CSXT pursuant to 49 U.S.C. § 20106

Since the 2007 Preemption Clarification Amended Act, courts are clear that the FRSA explicitly disclaims complete preemption. *Rawls v. Union Pac. R.R.*, 1:09-CV-01037, 2012 WL 2803764 (W.D. Ark. July 10, 2012). All of Plaintiffs' allegations against CSXT fall within the savings clause of § 20106. (Doc 7 at ¶ 16, 41-54.) As CSXT acknowledges, Plaintiffs' have

alleged violations of various duties which are imposed under federal law, state law, and CSXT internal rules. CSXT only takes issue with some allegations against it where Plaintiffs do not cite to any applicable federal regulations. CSXT's Louisiana case law it cites to support this assertion all pre-dates the 2007 Amended to the FRSA. As 49 U.S.C. § 20106 makes clear, CSXT can be held liable for Plaintiffs' injuries for violations of not only federal regulations, but also CSXT internal rules and State law or regulations (which includes Mississippi common law) that are necessary to eliminate an essentially local safety hazard, is not incompatible with a federal law and does not unreasonable burden interstate commerce.

Simply put, "the FRSA does not occupy the field of general railroad safety, but preempts only those state laws where the federal government has acted with respect to the same subject matter, and where the FRSA regulation substantially subsumes the subject matter of the state law. *Parise v. Union Pac. R.R.*, 2014 U.S. Dist. LEXIS 66464, *22 (E.D. Cal. May 14, 2014) As the Supreme Court noted, "the scheme of [state law] negligence liability could just as easily complement these [federal] regulations. . . ." *CSX Transp. v. Easterwood*, 507 U.S. 658, 668 (1993). For example, this district has held that an allegation for failing to slow or stop based on Mississippi common law is not preempted by the FRSA. See *Illinois Central R.R. v. Cryogenic Transp., Inc.*, 901 F. Supp. 2d 790, 804 (S.D. Miss. 2012). A stalled car is a "specific individual hazard" which "triggers a duty to slow or stop [the train] under common law." *Macfarlane v. Canadian Pac. Ry. Co.*, 278 F.3d 54, 59 (2d Cir. 2002); *Baker v. Canadian National Ry. Co.*, 397 F. Supp. 2d 803, 813 (S.D. Miss. 2005). The Baker Court specifically noted:

[T]he Supreme Court's reference to an exception for specific, individual hazards clarified that in addition to, or as a facet of a state's right to regulate as to essentially local safety hazards, federal regulations do not diminish the train crew's duty to exercise reasonable care to slow or stop the train to avoid an imminent collision.

Id. (referencing *Easterwood*, 507 U.S. at 675 n. 15.)

Moreover, allegations of improper maintenance are not preempted by the FRSA. *See Lundeen*, 532 F.3d at 697-88; *Zimmerman v. Norfolk Southern Corp.*, 706 F.3d 170 (2013). As this district has succinctly held, under Mississippi:

Railroads not only have statutory duties, but they also owe common law duties both as to railroad operations and crossing maintenance

Brown v. Amtrak, 2010 U.S. Dist. LEXIS 33216, *20, 2011 WL 1130545 (S.D. Miss. Mar. 28, 2011.) In sum, when taken as true, Plaintiffs' claims against CSXT are not preempted by the FRSA because they all fall within the scope of § 20106's savings clause. Thus, CSXT's motion should be denied.

III. PLAINTIFFS' WELL-PLED COMPLAINT MEETS RULE 8 NOTICE PLEADING REQUIREMENTS

At its best, CSXT's argument Plaintiffs have failed to meet Rule 8 pleading requirements is perplexing. CSXT acknowledges Plaintiffs' Complaint alleges "a series of alleged safety-related duties that CSXT is said to have violated. . . ." (Doc. 10 at 3.) In its first paragraph under the "Argument" section, CSXT again states, "The complaint alleges that CSXT violated a litany of supposed duties with respect to the operation of its train, as well as the inspection, repair, and maintenance of a rail crossing." (Doc. 10 at 4.)

Here, Plaintiffs' well-pled 18 page Complaint sets forth specific, factual allegations regarding CSXT's duties and its violations thereof. (Doc 7 at ¶ 16, 41-54.) Contrary to the barebones allegations in *Git-R-Done Prods.*, when taken as true, Plaintiffs' factual allegations support a plausible claim of negligence on the part of CSXT. The *Git-R-Done* Court took issue with the Defendant's Counter-Claims, alleging that there were no factual allegations made in that

claim, but instead only boilerplate language which did not suffice to meet even the liberal pleadings requirements under Rule 8(a). *Git-R-Done Prods. v. Giterdone C Store, LLC*, NO. 1:15CV386-LG-RHW, 2016 U.S. Dist. LEXIS 14328 at *4-*5 (S.D. Miss. 2016). In contrast to conclusory statements made *Git-R-Done*, Plaintiffs' Complaint alleges 41 specific factual paragraphs of actions or inactions CSXT or its train crew took, or failed to take, which resulted in the collision causing Plaintiffs' injuries. (Doc 7 at ¶ 35-53.)

Second, CSXT claims Plaintiffs are required to cite to specific federal rail regulations they assert were violated through its conduct, as a heightened duty requirement above and beyond Rule 8(a)'s pleadings requirements. (Doc. 10 at 10). However, the Supreme Court has unequivocally stated that a party need not cite the statutes or regulation violated to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 575 (2007) (citing *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1077-78 (7th Cir. 1992); *Vincent v. City Colleges of Chicago*, 485 F.3d 919, 924 (7th Cir. 1982); *Hemphill v. Unisys Corp.*, 855 F. Supp. 1225, 1233 (D.Utah 1994)). Plaintiffs have no such heightened pleadings requirement under Rule 8. Fed. R. Civ. P. 8(a); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 575 (2007). Plaintiffs' allegations against CSXT do not fall under the very limited exceptions exposed in Rule 9(b), which require heightened pleading requirements. *See*, Fed. R. Civ. P. 9(b); *Evancho v. Fisher*, 423 F.3d 347, 352 (3rd Cir. 2005). Therefore, CSXT's argument that specific regulations must be cited in the body of the complaint run counter to the Rules of Civil Procedure and well-established precedent.

What's more, as previously stated, Plaintiff's Complaint is not solely based off of CSXT's violations of federal regulations. In addition to violations of federal regulations, Plaintiff's Complaint alleges violations of internal CSXT rules, standards or plans, and violations of Mississippi law which are not incompatible with federal law. (Doc 7 at ¶ 16, 41-54.) This

includes both Mississippi statutory and common law.

Last, CSXT's reliance on *Prentice v. National R.R. Passenger Corp.*, No. 12-cv-05856-MEJ, 2014 U.S. Dist. LEXIS 108585 at *18-*19 (N.D. Cal. 2014) is also misplaced. *Prentice* was decided on summary judgment, only after the federal court provided plaintiff an opportunity to develop its case to show the internal railroad regulations, derived in response to federal regulations that were violated by the railroad's actions. In this case, Plaintiffs merely request that they be provided the same opportunity to develop their case as the federal court permitted in *Prentice*. For these reasons, CSXT's preemption argument which attempts to create a heightened standard for pleadings should be denied.

CONCLUSION

ICCTA complete preemption is inappropriate for Plaintiffs' typical negligence claim seeking redress for personal injuries. Plaintiffs' Complaint does not attempt to manage railroads in the economic realm and at its very best may have an incidental effect on rail transportation. At the pleading stage, CSXT's affirmative FRSA preemption defense is inappropriate before Plaintiffs are afforded the opportunity to complete discovery on their claims. Last, Plaintiffs' well-pled Complaint meets the Rule 8 pleading requirements and Plaintiffs' have stated a plausible claim for relief.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully requests that Defendants Motion to Dismiss be denied and for such further relief this Court deems fair and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and
JIMMY LEE WANECK,

Plaintiffs,

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. 1:17-cv-00106-HSO-JCG

Removed from the Circuit Court of
Harrison County, Mississippi
Second Judicial District

**REBUTTAL IN SUPPORT OF
CSX TRANSPORTATION, INC.'S MOTION TO DISMISS**

CSX Transportation, Inc. (“CSXT”) moved to dismiss plaintiffs’ Amended Complaint because it fails to allege facts from which liability could be plausibly inferred and clashes with two federal rail regulatory schemes that preempt the claims asserted.

The scope of this case has now narrowed. In their Amended Complaint (“Am. Compl.”), plaintiffs asserted that CSXT had failed to properly inspect its track and the crossing at issue, require its employees to report unsafe crossing conditions, and staff its dispatch center, among other duties. *See, e.g.*, ECF No. 1-1 at 9-10, 12-13. Both plaintiffs and co-defendants (collectively “Opposing Parties”) in their responses now insist that plaintiffs’ claims pertain only to CSXT’s maintenance of the crossing and to operation of the train. *See* Pls.’ Opp’n at 1 (May 5, 2017) (ECF No. 34) (“Plaintiffs’ negligence claims against CSXT are for improper

maintenance and operation. . . . Plaintiffs’ allegations against CSXT are, in pertinent part, related to improper maintenance of the highway-railroad grade crossing.”); Defs.’ Opp’n at 3-4 (May 8, 2017) (ECF No. 20) (noting that Wanecks’ claims are limited to maintenance and operation).¹ All other claims, which plaintiffs and co-defendants now “disclaim,” have been “abandoned” and judgment thereon should be entered accordingly. *Wentzell v. JPMorgan Chase Bank, N.A.*, Civ. A. No. 1:14cv182–HSO–RHW, 2015 WL 518656, at *3 (S.D. Miss. Feb. 9, 2015); *see also Tuskan v. Jackson Cty.*, 134 F. Supp. 3d 1041, 1047 (S.D. Miss. 2015) (defendants “entitled to judgment as a matter of law as to” abandoned claims).

While narrower, the claims are not stronger. These trimmed allegations remain facially preempted by ICCTA and by the FRSA. And plaintiffs have not pled facts to satisfy the bar set by *Iqbal* and *Twombly*.² Respectfully, the claims against CSXT should be dismissed.

I. ICCTA Preempts the Complaint’s Crossing-Related Claims.

A. Claims Concerning Maintenance of Railroads are Not Immune to ICCTA, and Here are Preempted.

The central thrust of the Opposing Parties’ position is that they bring only maintenance-related grievances against CSXT and, therefore, ICCTA preemption does not apply. *See* Pls.’ Opp’n at 4; Defs.’ Opp’n at 2-3; Def. Diamond’s Opp’n at 2-3 (May 9, 2017) (ECF No. 28). This is incorrect. Artful pleading—or what amounts to re-pleading through briefs, not through the proper vehicle of an amended pleading—does not let plaintiffs escape preemption. At any

¹ As pointed out in co-defendants’ response briefs, “Louis Ambrose’s Cross-Claim against CSXT is in all particulars identical to that of the Wanecks’ Complaint against CSXT.” Def. Diamond’s Opp’n at 2 n.1. CSXT accordingly directs points made with respect to the Wanecks’ complaint against Ambrose’s cross-claim as well. Likewise, as co-defendants’ response briefs are very nearly identical, citations to Defs.’ response brief are directed as well toward the other. Finally, cross-claimant Ambrose has filed an additional response (ECF No. 44) that reiterates the points of the other responses. This rebuttal applies equally to Ambrose’s second response.

² *Aschcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

rate, the statute itself, and legions of interpretive case authority, make plain that ICCTA prohibits state law and tort actions that “*manage or govern*” how a railroad designs, configures, operates or maintains its facilities. *Waubay Lake Farmers Ass’n v. BNSF Ry. Co.*, CV No. 12-4179, 2014 WL 4287086, at *6 (D.S.D. Aug. 28, 2014) (emphasis added). However Opposing Parties now cabin their claims, they still “would have the effect of preventing or unreasonably interfering with railroad transportation,” falling squarely within ICCTA’s express preemption provision. *See, e.g., Emerson v. Kans. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007) (citation omitted); Am. Compl. ¶¶ 25, 44-46. ICCTA prohibits this.

Tort claims come within ICCTA preemption when they “directly relate to railroad operations.” *In re Katrina Canal Breaches Consol. Litig.*, Civ. A. No. 05-4182, 2007 U.S. Dist. LEXIS 95799, at *126 (E.D. La. Dec. 27, 2007) (“*Katrina*”). Maintenance is no exception. This is because “maintenance is an integral part of running a railroad,” *Emerson*, 503 F.3d at 1134, and thus alleged action or inaction in the form of “maintaining an active rail line,” are “clearly [] part of ‘transportation by rail carriers,’” *Thomas Tubbs, et al. – Pet. For Declaratory Order*, STB. No. FD 35792, 2014 WL 55 08153, at *4 (S.T.B. served Oct. 31, 2014). Because such claims “seek to manage or govern railroad operations, allowing them to go forward would unreasonably interfere with rail transportation.” *Id.* at *5. As such, courts have regularly found ICCTA preemption of tort claims, like those here, that complain of improper or insufficient maintenance. *See, e.g., Jie Ao & Xin Zhou – Pet. for Declaratory Order*, S.T.B. No. FD 35539, 2012 WL 2047726, at *7 (S.T.B. served June 6, 2012) (claims preempted if they would “affect the amount and type of maintenance that could be performed on [a] railroad ROW”); *Waubay Lake Farmers Ass’n*, 2014 WL 4287086, at *6 (ICCTA preempted claims, beyond design and construction, for damages resulting from alleged failure to maintain a culvert running beneath a

track). Opposing Parties do not even mention controlling authority which affirmed a finding of ICCTA preemption on comparable facts. *See Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 537 (5th Cir. 2012).

Maynard v. CSX Transportation is likewise instructive. 360 F. Supp. 2d 836 (E.D. Ky. 2004). There, plaintiffs claimed a track structure blocked drainage, causing water to seep under the roadbed and damage property. As here, plaintiffs' central theory was that the railroad failed to maintain the drainage on the crossings, causing tracks to clog with mud and other debris. *Id.* at 843. The court determined that since the drainage at issue was caused by the construction *and* "maintenance" of tracks and crossings, the claims were preempted by ICCTA. *Id.*

To similar effect is *Tubbs v. Surface Transportation Board*, 812 F.3d 1141 (8th Cir. 2015). In this recent ruling, the Eighth Circuit affirmed a finding of the STB that tort claims focused on the destruction of the Tubbs family farm were preempted by ICCTA. The *Tubbs* plaintiffs sued, attributing property loss to BNSF Railway's allegedly poor maintenance and overall configuration of a railway embankment. *Id.* at 1143. The court affirmed the STB's holding that "the state-law claims would unreasonably burden or interfere with rail transportation because they are based on alleged harms stemming directly from the actions of a rail carrier . . . in designing, constructing, *and maintaining* an active rail line—actions that clearly are part of transportation by rail carriers." *Id.* at 1145-46 (internal quotation omitted) (emphasis added). The Board further reasoned that if such claims were not preempted, they would have the effect of interfering with the railroad's "ability to uniformly design, construct, *maintain*, and repair its railroad line." *Id.* at 1146 (emphasis added). Through tort, said the Eighth Circuit, the lawsuit would be doing the work of the STB by "subject[ing] construction of elevated railroad embankments to state regulation for height, width, and drainage via negligence actions." *Id.*

The same logic applies here. Claims challenging the maintenance of a railroad and its facilities may be no less intrusive than claims challenging a railroad's design. This is so here, where Opposing Parties contend that the Biloxi crossing is "dangerous and severely . . . 'humped'" due to CSXT's "automated" maintenance practices and that CSXT "should not be allowed to build up the crossing surface above the same level plane of the intersecting roadway." Am. Compl ¶¶ 25, 45. The Opposing Parties seek to use tort law to do the work of the STB by managing CSXT's maintenance and treatment of the crossing. This is prohibited by ICCTA.

B. The Complaint Seeks Economic Regulation Preempted by ICCTA.

Opposing Parties' next contention, that "[t]ort liability is not economic regulation in the sense contemplated by the ICCTA" (Pls.' Opp'n at 8-9), is startling given settled authority to the contrary. The U.S. Supreme Court has long resolved that tort claims are state regulation to which preemption applies. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) ("[S]tate regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (citation, original alteration omitted)). That tort claims may be not only regulation, but *economic* regulation, is amply demonstrated by each case in CSXT's opening papers finding ICCTA preemption. *See* Mem. in Support of CSXT's Mot. to Dismiss at 5-9 (Apr. 18, 2017) (ECF No. 10).

This stands to reason. "Allowing plaintiff to obtain a monetary or injunctive remedy by application of the state's nuisance law to defendant's actions is not significantly different from allowing the state to impose restrictions on defendant through laws and regulations." *Suchon v. Wis. Cent. Ltd.*, No. 04-C-0379-C, 2005 WL 568057, at *4 (W.D. Wisc. Feb. 23, 2005); *see also In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 WL 224072, at *5 (E.D. La.

Jan. 26, 2009) (“The 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.”). States may regulate via an award of damages under a common law claim as effectively as by some form of preventative relief. *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001). Indeed, the Waneck complaint and Ambrose cross-claims go further by seeking punitive damages. Allowing Opposing Parties to recover punitive damages would “allow almost unlimited state ‘regulation.’” *S.D. ex rel. S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 934 (D.S.D. 2003).

Opposing Parties seek to use tort law to impose intrusive and burdensome regulation upon CSXT separate and apart from how the STB chooses to do so. The complaint and cross-claims assert that the Biloxi crossing’s geometrical configuration, height, and shape are “ultra-hazardous” and “dangerous.” Am. Compl. ¶ 25 (“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 activities”); *id.* ¶ 46 (“The humped condition rendered the Main Street Crossing unsafe for motorists and extra-hazardous, ultra-hazardous, and unusually dangerous.”). They assert that the crossing should have been maintained differently, and that operation of a train through a crossing with this one’s physical characteristics is a violation of state tort law. *Id.* ¶ 44 (alleging CSXT “allowed maintenance activities at the [crossing] to alter the vertical alignment of the crossing and its approaches, thereby creating a severe incline or ‘hump’”); *id.* ¶ 45 (“CSX maintenance activities at the [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. . . . [B]oth approaches to the [crossing] were at an inappropriate incline to the crossing surface.”); *id.* ¶ 48 (alleging CSXT “knew, or should have known, that the unsafe crossing conditions . . . created a specific local hazard that should have been repaired, guarded against or warned about”).

These allegations can only be understood as a quest to have CSXT make the grade of the road approaches to the Biloxi crossing more gradual by lowering the length of track and related structures, or to cease its operations over the crossing. That is regulation; that is economic regulation; and that is “regulation” as defined by ICCTA’s section 10501(b).

C. Rail Crossings are Not Immune to ICCTA Preemption.

Opposing Parties assert a blanket rule that rail crossing cases are somehow exempt from ICCTA preemption. *See* Defs.’ Opp’n 12- 14. Not so. ICCTA broadly defines “transportation,” and “[t]here can be no doubt that a railroad crossing constitutes “property . . . related to the movement or passengers or property . . . by rail.”” *Katrina*, 2007 U.S. Dist. LEXIS 95799, at **123-24; *see also City of Ozark v. Union Pac. R.R. Co.*, 843 F.3d 1167, 1172-73 (8th Cir. 2016) (finding preemption in a crossing context); *Wichita Terminal Ass’n, et al.- Pet. For Declaratory Order*, STB No. FD 35765, 2015 WL 3875937, at *2 (S.T.B. served June 23, 2015) (same).

Opposing Parties maintain otherwise only by gravely miscasting the Fifth Circuit’s holding in *Franks Investment Co. v. Union Pacific Railroad Co.* 593 F.3d 404 (5th Cir. 2010). Plaintiffs in *Franks* argued that state property law prevented a railroad from closing private railroad crossings. 593 F.3d at 406. The court emphasized that the question of STB jurisdiction asks if the dispute involved laws “that have the effect of managing or governing, and not merely incidentally affecting, rail transportation.” *Id.* at 411. It found that the particular state law

remedy at issue did not. *Id.* *Franks* nowhere espouses a blanket rule exempting crossing cases from ICCTA's purview. The decision, said the Fifth Circuit itself, was a product of the failure of the railroad to "tie" specified burdens on rail transportation to the crossings at issue. *Id.* at 415.

The instant lawsuit presents different circumstances. Opposing Parties do not deny that that the "tie" found wanting in *Franks* is present. There is no dispute, or disputing, that Opposing Parties take aim at the Biloxi crossing and adjacent track structures; that the burdens on rail commerce they seek to impose are sought to be imposed on this crossing and track; and that CSXT's assertion of preemption is "tied" to that burden and to that crossing.

D. This is Not a "Typical" Crossing Case.

Opposing Parties declare that "simple" or "typical" negligence cases are not preempted by ICCTA. Pl.'s Opp'n at 11-13; Defs.' Opp'n at 15-19. True or not, the case before this Court is a far cry from the "typical" cases to which Opposing Parties refer.

For this notion, Opposing Parties rely on a statement from *Elam v. Kansas City Southern Railway Co.* that "[a] typical negligence claim seeking damages for a typical crossing accident . . . does not directly attempt to manage or govern a railroad's decisions in the economic realm." Defs.' Opp'n at 16, (quoting *Elam*, 635 F.3d at 813); Pls.' Opp'n at 11. Yet, as Opposing Parties acknowledge (Defs.' Opp'n at 15), elements of the *Elam* complaint were in fact found preempted (indeed, completely preempted): namely, allegations that the train occupied the crossing for an extended period of time, in violation of Mississippi's anti-blocking statute, 635 F. 3d at 806-08. The statute was thus found to manage the railroad's operations, and was therefore preempted.

Opposing Parties' "typical" crossing cases are typical in that underlying incidents occur at crossings. The cases do not pivot on crossing configuration; they do not take aim at the

geometry and height of the crossing and associated line of track; and they do not dictate how a railroad operates and shapes its crossing. Such cases do not “attempt[] to manage or govern a railroad’s decisions in the economic realm” via allegations about the railroad crossing and track structures. *See Elam*, 635 F. 3d at 808. The crossing merely happens to be the scene of an event.

This distinction is vital. Courts find ICCTA preemption when tort claims are not merely located at a crossing, but instead center upon the track structures and their physical characteristics. *See Katrina*, 2007 U.S. Dist. LEXIS 95799, at *125 (ICCTA preempted crossing allegations which were central and “inextricably intertwined” with the STB’s “exclusive jurisdiction over the ‘construction’ of railroad tracks”); *Maynard*, 360 F. Supp. 2d at 842 (ICCTA preemption found where “it is CSX’s construction and operation of the side tracks . . . which give rise to [p]laintiffs’ claims”). As shown above, and in CSXT’s opening brief, the claims here pivot centrally on these very physical characteristics of the Biloxi crossing.

Given the real-world consequences of Opposing Parties’ grievances, the relevant focus for ICCTA preemption purposes is not some indiscriminate collection of negligence cases (Pls.’ Opp’n at 11-12; Defs.’ Opp’n at 17-20), but rather cases that seek to impose similarly intrusive effects on rail transportation. Of particular note is *Texas Central Business Lines Corp.*, which affirmed a finding of ICCTA preemption on comparable facts (and which Opposing Parties omit to mention). 669 F.3d at 537. In that case, the city attempted to curtail new construction on a railroad. The city asserted that the railroad’s embankments and access roads were too steep and that the ancillary roadway was paved with the wrong material. The lower court determined that ICCTA preempted these claims, noting that “the grade of rail embankments is intrinsically part of the design and construction of tracks,” and “[t]he slope of rail embankments directly affects

where rail can be located on a given property.” *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, Civ. A. No. 3:07-CV-1351-N, Findings of Fact & Conclusions of Law at 25-26 (N.D. Tex. Apr. 8, 2010) (ECF No. 316), attached hereto as Ex. 1.

The Fifth Circuit affirmed, holding that “regulation which dictates the construction, design, and layout of railroad tracks would frustrate economic decision making.” *Tex. Cent.*, 669 F.3d at 533. “Such regulations have the effect of managing the economic decisions of [the railroad] in the context of transportation covered under the ICCTA.” *Id.* at 534. Thus, regulations that would apply to “the slope or other features of the embankments for the railroad tracks themselves are expressly preempted.” *Id.* at 533.

Also on point from this Circuit is *Katrina*. 2007 U.S. Dist. LEXIS 95799, at **123–24. There, plaintiffs alleged negligence claims based on the railroad’s decision of which materials to use in its rail crossing, and failure to install concrete pads or other erosion protection devices around the crossing. *Id.* at *112. The court considered whether tort claims “challenging the design and construction of a railroad crossing presents involves [sic] a state law remedy ‘with respect to regulation of rail transportation,’” and found that they did. *Id.* at *124. “[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.” *Id.* at **123-24. Therefore, the claim that the railroad negligently designed and constructed the crossing was completely preempted by ICCTA. *Id.* at *125; *see also Tubbs*, 812 F.3d 1141 (discussed above).

The logic of *Texas Central* and *Katrina* applies here. These allegations, like those in *Texas Central*, implicate, and seek to dictate, the configuration and operation of rail tracks and a

crossing. The claims are all but identical: Opposing Parties complain that the slope and surface of the roadway that intersects with the railroad is too steep. The only way to remedy the alleged “defects” is to force CSXT to rebuild its track at a lower level. Doing so would “have the effect of managing the economic decisions of [the railroad] in the context of transportation covered under the ICCTA.” *Tex. Cent.*, 669 F.3d at 534. The claims are thus preempted.

E. There is No Strong Presumption Against ICCTA Preemption.

Opposing Parties declare a “strong presumption” against ICCTA preemption when the law in question lies “within the scope of the States’ historic police powers.” Pls.’ Opp’n at 5. This does not advance the analysis facing this Court. The preemption language of ICCTA is both clear and sweeping in scope: Remedies provided “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)(2). This Circuit has observed that “[t]he language of the statute could not be more precise.” *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001). Any presumption against preemption “applies with less force when Congress legislates in a field with a history of significant federal presence,” such as railroads. *Texas Cent.*, 669 F.3d at 529 (citation and internal quotation omitted). While courts at times do say that ICCTA preemption “does not apply to state or local actions taken under their retained police powers,” they clarify that this is true only “as long as they do not unreasonably interfere with railroad operations or the Board’s regulatory programs,” *Tubbs*, 2014 WL 55 08153, at *3 (emphasis added) (citations omitted).

As a result, courts find ICCTA preemption, even in so-called “police power” settings, when the state tort claim in question has the effect of “managing or governing” the operations of the railroad. As the *Katrina* court explained:

[E]ven if plaintiffs' claim is construed as one to enforce the state's traditional police power to protect the health and safety of its citizens, the claim is preempted by ICCTA. "Congress made no blanket exception for a state's police power when describing the ICCTA's preemption scope. . . . [T]he state retains its traditional police power in terms of public health and safety *except where the state's actions regulate rail transportation.*"

2007 U.S. Dist. LEXIS 95799, at **127-28 (quoting *A&W Props., Inc. v. Kan. City S. Ry. Co.*, 200 S.W.3d 342, 347 (Tex. App. 2006) (emphasis added)).

Opposing Parties relatedly contend that preemption cannot be the outcome here since Congress would not have "stripped" injured persons of any "meaningful right to recover for their injuries." Pls.' Opp'n at 13. Whether a remedy may be precluded does not resolve preemption analysis. *See Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 341 (4th Cir. 2007) ("ERISA's preemptive scope is not diminished simply because a finding of preemption will leave a gap in the relief available to a plaintiff." (citation omitted)). Such is the reality of the Constitution's Supremacy Clause. There are certain fields in which Congress intended to preclude certain remedies, including regulation of railroad operations through certain tort suits like this one. At any rate, ICCTA does in fact provide forms of relief to aggrieved parties. *See* 49 U.S.C. § 11704(b); 49 U.S.C. § 11704(c)(1).³

F. The Opposing Parties' Remaining Authorities are Not Applicable.

What remains of Opposing Parties' opposition is a litany of cases which they claim support that "ICCTA preemption is inappropriate in typical negligence claims seeking damages for accidents." Pls.' Mem. at 11; Defs.' Opp'n at 20. As noted, there is nothing "typical" about

³Moreover, CSXT is not the lone defendant in this case. It is not necessary that this Court disturb the nation's rail transportation, unduly burden transportation in and around Biloxi, or do the work of the STB or other appropriate regulatory agencies in order for plaintiffs to pursue remedies. *Cf. Tubbs*, 812 F.3d at 1145 ("Moreover, the [plaintiffs] cannot prevail under their own test because they have not established that they have no federal remedies remaining. Indeed, they embrace the surviving tort claims. . . .").

the crossing allegations they assert in this case. Worse, Opposing Parties mistakenly here invoke cases involving complete preemption, a separate doctrine concerned with the creation of federal jurisdiction for purposes of removal of state law claims to federal court. And only “typical” negligence cases are cited as they fail to address facts comparable to those at issue in this case, where Opposing Parties attempt to subject the railroads to intrusive and burdensome regulation.⁴

II. The FRSA Preempts Plaintiffs’ Claims of Maintenance and Operation.

The framework of proper FRSA preemption analysis is not in dispute here. Opposing Parties appear to acknowledge that the FRSA preempts claims where a FRSA regulation substantially subsumes the subject matter of a claim. *See* Pls.’ Opp’n at 19. And, as they point out, the FRSA requires that non-preempted claims (1) be tied to a federal regulation, (2) be tied to an internal rule created pursuant to a federal regulation, or (3) fit within the local hazard exception. *Id.* at 16-17. With that framework in place, the preemptive outcome is made plain. Plaintiffs’ claims—limited now, unequivocally, to those of maintenance of the Biloxi crossing

⁴ Opposing Parties’ cases do not challenge the configuration and geometry of crossings or tracks and as such were found not to be attempts to regulate rail activities. *See New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 333 (5th Cir. 2008) (railroad failed to show how state statute unreasonably interfered with operations); *Battley v. Great W. Cas. Inc. Co.*, No. 14-494-JJB-SCR, 2015 U.S. Dist. LEXIS 35170, at **4-5 (M.D. La. Jan. 12, 2015) (negligence claim not completely preempted when it did not challenge railroad’s operating procedures and instead took issue with defendants’ refusal to move train); *Anderson v. Union P. Ry. Co.*, No. 10-cv-193-DLD, 2011 WL 4352254, at *4 (M.D. La. Sept. 16, 2011) (no complete preemption where negligent design and construction claims made only in passing); *Rawls v. Union P. Ry. Co.*, No. 1:09-cv-01037, 2012 WL 2803764, at *6 (W.D. Ark. July 10, 2012) (no complete preemption when defendants offered no evidence of significant intrusion on rail transportation); *Watkins v. RJ Corman R.R.*, No. 7:09-114-KKC, 2010 U.S. Dist. LEXIS 41244 (E.D. Ky. Apr. 27, 2010) (negligence claim stemming from a rail tunnel fire not preempted because tracks were removed and line at issue no longer served rail traffic); *Staley v. BNSF Ry. Co.*, No. 14-cv-136-BLG-SPW, 2015 U.S. Dist. LEXIS 24275, at *18 (D. Mt. Feb. 27, 2015) (no complete preemption given evidence that railroad had implemented simple, nonintrusive measures to avoid alleged safety hazard in the past); *Allied Indust. Dev. Corp. v. Ohio Cent. R.R., Inc.*, No. 4:09-CV-01904, 2010 U.S. Dist. LEXIS 37540 (N.D. Ohio Apr. 14, 2010) (trespass claim was not regulation of rail activities); *Trejo v. Union Pac. R.R. Co.*, No. 3:10-cv-00285 JLH, 2011 WL 309614 (E.D. Ark. Jan. 28, 2011) (no allegation taking issue with shape and construction of crossing).

While *Union Pacific Railroad Co. v. Louisiana Public Service Commission*, 722 F. Supp. 2d 699 (M.D. La. 2010) is an ordinary preemption case, the facts are readily distinguishable. The case involved facial preemption, where a statutory requirement that railroad obtain government permission to close a private crossing was preempted. In finding no preemption, the court did not engage in an “as applied” analysis to determine if the regulation “would have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* at 706 (citation omitted).

and train operation—are subsumed by federal regulations. Their claims seek to expand upon duties established in those regulations, and neither plead nor even suggest a violation of such regulations or CSXT’s internal rules. And plaintiffs do not strive to place this case within the local hazard exception, nor could they. FRSA preemption thus applies.

A. Federal Law Substantially Subsumes Plaintiffs’ Claims.

Plaintiffs do not meaningfully dispute that their crossing and train operations are addressed and covered by FRA regulations. They instead assert, in the purest conclusory fashion, that “CSXT ignore[d] Plaintiffs’ well-pled complaint which makes allegations . . . for violation of a federal standard of care.” Pls.’ Opp’n at 13. This misses the point. Whether plaintiffs’ claims are subsumed by federal regulations is a question separate from whether those claims are well-pled. Plaintiffs’ allegation that CSXT was negligent in failing to properly maintain the grade crossing is subsumed by 49 C.F.R. Part 234—*Grade Crossing Safety*.⁵ And plaintiffs’ assertion that CSXT should have kept a lookout or otherwise operated the train differently is subsumed by 49 C.F.R. Part 218—*Railroad Operating Practices*, which regulates railroad operating practices. One can search Opposing Parties’ papers and find no contesting that FRA regulations cover plaintiffs’ remaining claims.

B. Plaintiffs Attempt to Impose Obligations Beyond What is Allowable Under 49 U.S.C. § 20106.

Plaintiffs’ claims—all of which are covered by FRA regulations—are untethered to either a violation of federal obligations or an exception to FRSA preemption. Where FRA has promulgated regulations covering the subject matter of a claim, the claim should be dismissed if

⁵ *Brown v. National Railroad Passenger Corp.*, Civ. A. No. 3:08cv559KS–MTP, 2011 WL 1130545 (S.D. Miss. Mar. 28, 2011), cited by plaintiffs to say that there are common law duties as to the angle of the crossing (Pls.’ Opp’n at 20), has no discussion whatsoever of preemption, nor does it address applicable federal regulations.

it imposes burdens beyond the federal requirements. *See Givens v. Union Pac. R.R. Co.*, 28 F. Supp. 3d 854, 860 (E.D. Ark. 2014).

With respect to plaintiffs' maintenance claims, Opposing Parties do not dispute that extensive regulations set forth the applicable grade crossing maintenance standards and CSXT's corresponding obligations. *See* 49 C.F.R. Part 234. These regulations direct railroads to maintain and inspect crossing *devices*, but impose no obligations as to the pavement or angle of a crossing. *See* 49 CFR Part 234; *see also* Defs.' Opp'n at 22; Def. Diamond Tour's Opp'n at 21-22 (citing same in *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170 (3d Cir. 2013)).⁶ Plaintiffs fail to point to any regulation that CSXT has allegedly violated. As such, their claims are preempted. 49 U.S.C. § 20016(a)(1); *see CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 661 (1993).

As for their claims based on train operation, plaintiffs do not specify whether any exception should apply, or otherwise explain why such claims may not be preempted. Beyond a generic disclaimer that some (unspecified) claims may meet the "local hazard" exception (Am. Compl. ¶ 16(c)), plaintiffs say no more. They, and Opposing Parties more generally, do not explain why operation-based claims, or any claims in this case for that matter, should be exempt.

Finally, plaintiffs contend that any claim based on a rule "contemplated by the federal regulations" may escape preemption. Pls.' Opp'n at 17. This is overly broad. 49 U.S.C. § 20106(b)(1)(B) (FRSA does not preempt claims for personal injury or property damage where plaintiffs allege that a party "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*") (emphasis added)); *see also Harris v. Norfolk S. Ry.*, 2012 WL 6209164, at *7 (S.D. W. Va. 2012) (claim

premised on alleged violation of internal rules was preempted because the relevant “regulation *allows* a railroad to adopt and enforce additional or more stringent rules” but “does not *require* railroads to adopt any internal rules or plans”) (emphasis in original), *rev’d in part on other grounds*, 784 F.3d 954 (4th Cir. 2015). FRA has also directly addressed the application of preemption to operating rule violations. *See Passenger Equip. Safety Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives*, 75 Fed. Reg. 1180, 1209 (Jan. 8, 2010) (Section 20106(b) “precisely addresses an issue . . . that Congress wished to rectify: it allows plaintiffs to sue a railroad in tort for violation of its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries. *None of those exceptions covers a plan, rule, or standard that a regulated entity creates for itself in order to produce a higher level of safety than Federal law requires. . . .*”) (emphasis added)). Plaintiffs’ claims thus cannot be saved from preemption on the basis of CSXT’s own rules, as the scope of those rules with respect to preemption is coextensive with federal regulations.

C. Discovery is Not Necessary or Warranted.

Opposing Parties seem to suggest that FRSA preemption is categorically a matter not to be resolved on the pleadings. *See* Pls.’ Opp’n at 13; Defs.’ Opp’n at 25-26. Yet courts can and do find FRSA preemption on the pleadings. *See, e.g., In re Katrina Canal Breaches Consol. Litig.*, 2009 WL 224072, at *2; *Ayling v. BNSF Ry. Co.*, No. 2:14-CV-42, 2014 WL 12605590, at *4 (D.N.D. Oct. 20, 2014). The Fifth Circuit has also confirmed that state law tort claims should

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⁶ For this reason *Zimmerman* is inapposite, as plaintiff’s claims there were primarily based on the inadequate maintenance of crossing devices in violation of the applicable federal requirements. 706 F.3d at 188.

be dismissed at the threshold where preempted. *See Frank v. Delta Airlines, Inc.*, 314 F.3d 195 (5th Cir. 2002) (reversing Texas district court where claims preempted by federal statute).

But, plaintiffs protest, “[n]o formal discovery has taken place.” Pls.’ Opp’n at 18; *see also* Defs.’ Opp’n at 25. That is both true and immaterial. The pending motion tests sufficiency of the facts alleged, not the possibility of what discovery might reveal. As the Supreme Court explained in *Iqbal*, the plausibility requirement “asks for more than a sheer possibility that a defendant has acted unlawfully. “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief,” and should be dismissed. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal quotation omitted). It is not enough for plaintiffs to speculate that discovery *might* reveal evidence to sustain their claims. This is precisely what animated *Twombly* and *Iqbal*.

III. Plaintiffs’ Claims Are Inadequately Pled.

At the motion to dismiss stage, it is this Court’s task to survey the complaint’s allegations and determine whether they plausibly support a viable claim for relief. Here, they do not. They confuse alleging duties with alleging facts sufficient to plausibly infer a violation of such duties, and leave CSXT with no notion of what federal obligation it has supposedly violated.

Opposing Parties proceed as if there is some sort of exception to modern pleading requirements where FRA regulations are concerned, and that they not need to allege a required element of a non-preempted claim. *See* Pls.’ Opp’n at 21; Defs.’ Opp’n at 24-26. Yet they cite no authority for their position.⁷ Without alleging that crucial element, CSXT and the Court are

⁷ Opposing Parties repeatedly cite to Justice Stevens’ dissent in *Twombly* for the proposition that “the Supreme Court has unequivocally stated that a party need not cite the statutes or regulation violated to survive a motion to dismiss.” Pls.’ Opp’n at 21; Defs.’ Opp’n at 24 (citing same). The dissent says no such thing, and neither does the majority opinion. Moreover, the case that plaintiffs
(continued...)

left to speculate as to which regulation, or rule created pursuant to a regulation, it has supposedly violated, thereby keeping plaintiffs' claims at a level that is "merely consistent with a defendant's liability." *Iqbal*, 556 U.S. at 678. This is what Rule 8 prohibits.

Opposing Parties thus pivot, devoting considerable time to outdated law in hopes of easing their burden at the motion to dismiss stage. *See, e.g.*, Pls.' Opp'n at 21; Defs.' Opp'n at 6 (arguing the complaint fulfills "the *Hishon* standard as used by the federal courts" (citing *Hishon v. King & Spalding*, 467 U.S. 69 (1983))); *id.* at 8 (citing a 2004 case for the proposition that "fair notice" is given "where only the title of the theory is pled" (citing *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 305 F. Supp. 2d 658 (E.D. Tex. 2004))); *id.* at 24 (arguing, based on 2006 case law, that because plaintiffs' claims are not subject to Rule 9(b), CSXT may not argue that "this complaint is deficient because it does not allege X" (quoting *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006))). They then suggest *Twombly* and *Iqbal* merely "clarified" or "modified" notice pleadings requirement. *See, e.g.*, Pls.' Opp'n at 1; Defs.' Opp'n at 2.

This undersells the profound sea change in pleading obligations since imposed by the Supreme Court, which specifically and resoundingly retired the traditional notice pleading requirements in *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 565, and further reinforced the new plausibility-based pleadings standard two years later in *Ashcroft v. Iqbal*, 556 U.S. 662. Under modern pleading standards, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Accordingly, "a plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the

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claim it cites (*Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1982)) appears nowhere in the
(continued...)

complaint that the defendant violated the law.” *Iqbal*, 556 U.S. at 678; *see also Dowdy & Dowdy P’ship v. Arbitron Inc.*, No. 2:09CV253 KS-MTP, 2010 WL 3942755, at *3 (S.D. Miss. Oct. 6, 2010) (“[C]onclusory allegations are not entitled to be accepted as true for the purposes of this motion.”). Nor is it any longer appropriate to speculate about whether some hypothetical but unpled set of facts might in theory support plaintiffs’ claims. The sufficiency of the complaint turns on its well-pled factual content, not conclusory assertions of wrongdoing, speculation about what discovery might reveal, or labels plaintiffs assign their claims.

As CSXT outlined, plaintiffs do list duties that CSXT is supposed to have violated. Such listing may have been sufficient under pre-*Twombly* notice pleading standards. It is not sufficient now. The complaint proceeds in the same rote fashion as to all its theories of liability: it states an alleged duty, offers conclusory allegations that duties were not complied with, and alleges that injuries are a result of CSXT’s conduct. Aside from these cookie-cutter allegations, it does not provide the crucial “how.” The modern pleading standard “asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

Plaintiffs do no more than plead facts “merely consistent with” liability. Alleging that CSXT “routinely ignor[ed] the hazardous conditions posed by the Main Street Crossing” (Am. Compl. ¶ 41(c)), is not the same as alleging facts to support that claim. Notably absent are allegations as to CSXT beyond that there was a “dangerous and severely inclined” crossing, and that the train collided with the bus. Plaintiffs allege no facts allowing plausible inference that

(...continued)
decision.

CSXT failed a duty to maintain the crossing or operated its train outside the bounds of reason. They certainly have not alleged facts to support claims as to CSXT's internal workings, such as the allegation that CSXT "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." *Id.* ¶ 39. To meet the established standard, plaintiffs must do more than simply allege a duty existed and was violated. Facts are required, and plaintiffs offer none.

CONCLUSION

CSXT's motion to dismiss should be granted.

This the 22nd day of May, 2017.

Respectfully submitted,

CSX TRANSPORTATION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of May, 2017, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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EXHIBIT 1

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

TEXAS CENTRAL BUSINESS LINES
CORPORATION,

Plaintiff,

v.

CITY OF MIDLOTHIAN,

Defendant.

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Civil Action No. 3:07-CV-1351-N

ORDER

This case was called to trial on November 30, 2009. All parties appeared through representatives and counsel and announced ready. The case proceeded to trial before the Court through December 3, 2009. Based on the evidence at trial, together with the arguments of counsel, this Order constitutes the Court’s findings of fact and conclusions of law.

I. BACKGROUND OF THE DISPUTE

A. Origins of the Transload Center

This case is substantially different now than when it first came before the Court. The transloading operations are different. The entities involved are different. The contractual arrangements are different. And the municipal ordinances involved are different. Consequently, the factual issues involved in the Court’s prior Orders in this case have changed. Nonetheless, one central issue remains the same. A municipality opposed to the expanding operations of a rail carrier attempts to use municipal ordinances to thwart those

operations – precisely the scenario Congress feared when it preempted state regulation of rail carriers.

Plaintiff Texas Central Business Lines Corporation (“TCB”) conducts transloading operations within Defendant City of Midlothian (the “City”). “Transloading” is the process of transferring freight from rail cars to trucks for further transportation.¹ TCB operates within an industrial park consisting of approximately 600 acres within the City owned by Third-Party Defendant Texas Properties Trust (“TPT”). TCB is a rail carrier operating in interstate commerce and subject to the jurisdiction of the Surface Transportation Board (“STB”). Prior to TCB’s commencing operations, TPT leased a majority of its property to MidTexas International Center, Inc. (“MidTexas”), which used a portion for unloading automobiles from rail cars and staging them for delivery to dealerships.

On August 29, 2002, TCB began subleasing approximately 20 acres from MidTexas for its transloading operations (the “Transload Center”). TCB transloaded a variety of materials for a variety of customers. For some of the customers, TCB’s contractor performed the actual transloading of materials from rail car to truck; other customers did the actual transloading themselves (“self-transloaders”). On September 1, 2008, MidTexas relinquished its lease for 243 acres of the park and TCB began leasing those acres (including the 20 acres in the earlier sublease) directly from TPT. The apparent impetus for this

¹Transloading could also involve transfers from truck to rail, but in this case the transloading goes only the other direction.

transaction was the proposed expansion of the operations of Third-Party Defendant MAALT, L.P. (“MAALT”).

MAALT is primarily in the trucking business. As it pertains to this dispute, MAALT transported frac sand² for Halliburton from rail cars at the TCB Transload Center to Halliburton natural gas well drilling sites. Halliburton apparently was experiencing increased demand for its drilling services and desired substantially increased delivery of frac sand through the Transload Center. To accommodate Halliburton’s needs, TCB, MAALT, and Halliburton entered into a three-cornered transaction³ that would increase the capacity to transload frac sand at the Transload Center (the “Silo Project” and the North Rail Loop” project). The City generally opposed any expansion of TCB’s operations at the Transload Center. This dispute resulted.⁴

B. The City Ordinances

The City claims that TCB’s expanded operations violate several municipal ordinances. First, the City has adopted a comprehensive zoning plan in which all land in the City is placed into zoning districts with specific uses, by zoning category. The Transload Center is zoned light industrial. The City claims that TCB’s operations at the Transload Center are not

²“Frac sand” is apparently used in the hydraulic fracturing process involved in completion of gas wells in this area.

³This transaction is discussed at greater length below.

⁴The Silo Project and the associated North Rail Loop project are not the only points of dispute between the City and TCB, but those two appear to be the central issue. TCB also requests the Court to make findings concerning prospective transloading by Musket. The Court finds those plans are insufficiently concrete to permit the required factually intense evaluation, and are therefore not ripe.

permitted under light industrial zoning. In 2008, in response to Court rulings in this case, the City amended its zoning ordinance exempting any use that “constitutes transportation by rail carrier” from regulation.

The City has adopted the 2003 International Building Code. It requires that parties like TCB obtain building permits and submit site plans prior to construction. It also provides substantive standards for construction. The City has also adopted a grading ordinance which requires submission of site plans and obtaining a grading permit before development of land. The grading ordinance also provides substantive standards relating to excavation and fill activities. The City has adopted a Standard Construction Details ordinance which addresses construction and design of roads and other impervious surfaces. Finally, the City has adopted a floodplain ordinance that regulates development in floodplains according to FEMA rules.⁵

The City claims that the Silo Project and the North Rail Loop project violated both procedural and substantive aspects of these ordinances. The procedural claim is that TCB did not submit site plans (and related construction documents) and obtain required permits prior to its construction activities. The substantive claims are that the construction does not comply with various substantive requirements, such as road surface composition, grading slopes, and floodplain runoff capacity.

⁵At one point the City also asserted violations of its tree preservation ordinance. The City did not address this claim in its post-trial briefing and has not submitted any proposed findings of fact or conclusions of law relating to that ordinance and thus appears to have dropped that claim.

By Order dated November 19, 2009, the Court dismissed the City's claims relating to requirements of preconstruction permits or approval. The Court reaffirms that ruling and holds that TCB has shown that any City codes or ordinances that required TCB to obtain preconstruction approval or permits in connection with the Silo Project and North Rail Loop project are preempted. At the close of the City's case, the Court orally granted TCB and MAALT's motion for judgment as a matter of law on the City's substantive building code claims. In the alternative, pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, the Court finds that the City failed to establish by a preponderance of the evidence any substantive building code claims against either TCB or MAALT.

C. ICCTA and the STB

Congress significantly changed the regulatory environment for rail carriers in the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). Pub. L. 104-88, 109 Stat. 803. ICCTA establishes the exclusive jurisdiction of the Surface Transportation Board ("STB"):

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 recently addressed the preemptive scope of ICCTA in *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010) (en banc). The Court first considered express preemption:

The text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted.

Finally, the remedies that are preempted are those “provided under Federal or State law,” but those remedies receive their meaning from the earlier part of the sentence. To the extent remedies are provided under laws that have the effect of regulating rail transportation, they are preempted.

This analysis is consistent with the STB’s explanation of preemption under the ICCTA. Our *Barrois* opinion reviewed the STB’s interpretation, and found that it distinguished between two types of state actions:

First, there are those state actions that are “categorically preempted” by the ICCTA because such actions “would directly conflict with exclusive federal regulation of railroads.” Regulations falling within this first category are “facially preempted” or “categorically preempted” and come in two types:

The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized

Second, there can be no state or local regulation of matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.

[*New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d [321,] 332 [(5th Cir. 2008)] (citations omitted). Such regulation would by its very nature be “unreasonable interference with interstate commerce” and must be preempted. *Id.*

Id. at 410-11. After reviewing various precedents from other circuits, the Court observed: “Substantial interference with railroad operations will be preempted; routine crossing

disputes will not. . . . For a state court action to be expressly preempted under the ICCTA, it must seek to regulate the operations of rail transportation.” *Id.* at 413.

The Court then considered implied preemption. After discussing the STB test and determining that the STB test was not binding, *id.* at 413-14, the Court determined it would adopt the STB test. “Under this fact-based test, state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation.” *Id.* at 414.

A related issue raised by some of the claims considered below is the so-called health and safety exception to preemption. The Second Circuit has observed:

It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

II. MAALT OPERATES THE SILO PROJECT UNDER THE AUSPICES OF TCB

A. Legal Background

The City’s most fundamental attack on the Transload Center claims that MAALT’s operations do not constitute transportation by a rail carrier. The City does not argue that transloading is not transportation by rail, but rather that MAALT’s activities are not by a rail carrier. A variety of judicial and STB decisions address that issue. In *Town of Babylon*, STB

Finance No. 35057, 2008 WL 275697 (STB February 1, 2008) (*Babylon I*), the STB observed:

As noted, the Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a). Accordingly, to be subject to the Board’s jurisdiction and qualify for Federal preemption under section 10501(b), the activities at issue must be transportation, and that transportation must be performed by, or under the auspices of, a “rail carrier.” A “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation . . .” 49 U.S.C. § 10102(5). Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination.

Id. at *3 (footnotes omitted). The Court will consider some of those decisions at length to illustrate the fact-specific determinations involved.

Town of Babylon involved a transload facility called Farmington Yard, owned by Pineland Cemetery. Pineland leased the yard to the parent of the Long Island Railroad, which transferred its interests in the yard to New York and Atlantic Railway (“NYAR”), which in 2002 leased the yard to Coastal Distribution LLC (“Coastal”). Coastal began construction of a building for transloading construction and demolition debris (“C&D”). On March 29, 2004, Babylon issued a stop work order to Coastal because Coastal did not obtain a construction permit. On August 5, 2004, NYAR and Coastal replaced their lease with a Transload Facility Operations Agreement. The Operations Agreement recited that NYAR engaged Coastal as NYAR’s contractor and that NYAR would control all aspects of the operations at the yard. NYAR and Coastal sought and obtained a preliminary injunction from a federal district court against Babylon prohibiting Babylon from enforcing the stop work order. Babylon in the meantime sought a declaratory order from the STB.

The STB granted declaratory relief that Coastal's activities were not transportation by rail carrier. The Board's pertinent findings were:

Based on all of the information provided by the parties, we find that the facts of this case fail to establish that Coastal's activities are being offered by NYAR or through Coastal as NYAR's agent or contract operator. While the Operations Agreement includes a statement providing that NYAR "shall control all aspects of the Facility's transloading operations," the agreement, when considered in its entirety, shows that NYAR has essentially no involvement in the operations at the facility. Under the parties' agreement, NYAR's responsibility and liability for the cars ends when they are uncoupled at the Farmingdale Yard and resumes when they are coupled to NYAR's locomotive. Coastal exercises almost total control over the activities of the facility. For example, Coastal has the exclusive right to conduct transloading operations on the property. Coastal built the facility and, pursuant to the Operations Agreement, is responsible for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. Coastal also performs the marketing activities for the operations at the facility and provides and maintains all rail cars. Coastal is entitled to charge a loading fee for its transloading services, a fee which is in addition to the rail freight transportation charge payable to the railroad and over which NYAR has no control. And for use of the facility, Coastal pays NYAR a usage fee of \$20 per loaded rail car (inbound or outbound).

Moreover, Coastal, not NYAR, conducts all customer negotiations and bills and collects the loading fee from customers separately from the transportation charges, which are collected by the connecting Class I carrier (CSX Transportation, Inc.). In fact, Coastal may enter into separate disposal agreements in its own name with customers for disposition of commodities after transportation, from which NYAR disclaims any liability. Finally, the parties' agreement provides that Coastal must maintain liability insurance executed in favor of NYAR and that Coastal agrees to indemnify NYAR for all claims and liability arising out of Coastal's use of the premises.

In sum, the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent or under the auspices of NYAR.

Id. at *4 (footnote omitted).

In response to the STB, Coastal and NYAR amended their agreement and sought a do-over. *Town of Babylon – Petition for Declaratory Order*, 2009 WL 3329242 (STB October 16, 2009) (*Babylon III*). The STB rejected their attempt to contract around the STB’s first ruling:

Although the Respondents apparently drafted the Amended Agreement to respond to our prior decisions, we do not find the changes sufficient to make Coastal NYAR’s agent. Nor are Coastal’s activities under the Amended Agreement an integral part of NYAR’s operation as a rail carrier.

While Respondents have represented to the New York district court that, under the Amended Agreement, NYAR sets transloading fees and assumes a greater role in the operation of the yard, the actual terms of the agreement do not support such claims. First, the Amended Agreement authorizes NYAR to adjust the transloading fee; however, it is “at Coastal’s request or with Coastal’s consent.” Petitioners’ Petition to Reopen and Petition for Declaratory Order, Ex. F, 3.01. Also, the fee must be sufficient to pay all operating expenses, a reasonable return on Coastal’s investment, and a reasonable profit margin. *Id.* Thus, NYAR continues to have only limited influence over transloading fees. Accordingly, the Amended Agreement does not effectively change the setting of transloading fees by Coastal from the earlier agreement, for purposes of establishing an agency relationship or integration of operations as a railroad carrier.

Second, the Amended Agreement does not give NYAR control over the operation of Farmingdale Yard. While NYAR is responsible for inspection and maintenance of all tracks within the yard, Coastal remains “solely responsible for all necessary repairs, maintenance and upkeep of the facility.” *Id.*, 1.07, 4.02(b). While NYAR becomes the owner of any improvements to the yard that Coastal makes – including the transloading structure at issue here – NYAR is under no obligation to pay or repay Coastal for improvements.

Finally, Coastal alone continues to provide transloading services. Coastal alone loads and unloads commodities. And Coastal alone bills customers for its loading services. *Id.*, 1.02, 1.05(a), 2.02.

The agreement contains two provisions that purport to vest authority in NYAR. But when read in the context of the overall agreement conferring specific powers on Coastal, these provisions have no effect. First, the

amended agreement requires that all documents produced by Coastal recite that it is acting as NYAR's agent. But a requirement that Coastal merely offer such a recitation does not divest it of any of the powers vested in it by the agreement and vests no powers at all in NYAR. Second, the agreement recites that NYAR "shall control all aspects of the Facility's transload operations" *Id.*, 1.03. But, likewise, this general statement does not deprive Coastal of any of the specific powers vested in it by the agreement and grants no specific authority to NYAR.

This case is distinguishable from *The City of Alexandria, Virginia – Petition for a Declaratory Order*, STB Finance Docket No. 35157 (STB served Feb. 17, 2009). There, the Board found that a transloading company was an integral part of the railroad's operation and that the contract operator's services were bundled into the transportation services of the carrier. The record in that proceeding showed that the rail carrier built the facility with its own funds, paid the third-party transload operator a fee for performing transloading service rather than receiving rent from the operator, and could remove the operator on short notice without cause. Further, the transload operator was expressly prohibited from marketing the transload facility; it did not hold itself out as offering transloading services; and it did not set, invoice for, or collect transloading fees. Here, in contrast, Coastal's transload services are separate from, and distinguishable from, NYAR's freight rail service offerings. Coastal built the Farmingdale Yard, not NYAR; Coastal has the exclusive right to conduct the transloading operations under a long-term lease; Coastal collects its transload fees from its customers directly; Coastal pays fees to NYAR in the nature of rent; and Coastal can only be removed during the term of the agreement for cause.

In sum, after reviewing the Amended Agreement, it is apparent that Coastal still operates Farmingdale Yard with a high degree of autonomy, independent of NYAR. The level of involvement of NYAR remains insufficient to establish it either as the operator of the facility or as the principal of Coastal. Nor are Coastal's activities integral to NYAR's provision of transportation as a "rail carrier." Because Coastal is not a rail carrier, the agent of a carrier, or an integral part of NYAR's rail operation, we lack jurisdiction to regulate Farmingdale Yard, federal preemption does not apply, and the facility remains subject to state and local regulation. *See Hi Tech, LLC v. New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004).

Id. at *3-5.⁶

The STB reached the opposite result in *City of Alexandria, VA – Petition for Declaratory Order*, STB Finance Docket No. 35157, 2009 WL 381800 (February 17, 2009). Norfolk Southern Railway Company (“NS”) and RSI Leasing, LLC (“RSI”) began operation of an ethanol transloading facility within the City of Alexandria. The City commenced a declaratory order proceeding before the STB seeking an order from the STB that its zoning and other regulatory authority were not preempted. The STB first observed:

In determining whether transloading activities come within the Board's jurisdiction where a third party performs the physical transloading (transferring material to or from rail at a transloading facility), the Board has looked at such factors as: whether the rail carrier holds out transloading as part of its service; whether the railroad is contractually liable for damage to the shipment during loading or unloading; whether the rail carrier owns the transloading facility; whether the third party is compensated by the carrier or the shipper; the degree of control retained by the carrier over the third party; and the other terms of the contract between the carrier and the third party.

Id. at *2. The STB then considered the details of NS and RSI’s operations:

To begin with, NS owns the Facility and constructed it with NS’s own funds. By contrast, in *Hi-Tech [Trans, LLC – Petition for Declaratory Order]*, STB Finance Docket No. 34192 (Sub-No. 1), 2003 WL 21952136 (STB August 14, 2003), *Milford [Town of Milford, MA – Petition for Declaratory Order]*, STB Finance Docket No. 34444, 2004 WL 1802301 (STB August 12, 2004)] and *Babylon*, the third-party contractors constructed or planned to construct the transloading facilities themselves.

Second, the NS-RSI operating agreement does not have any of the characteristics of a lease or license that would be consistent with RSI’s

⁶Related decisions include *Town of Babylon – Petition for Declaratory Order*, 2008 WL 4377804 (STB September 26, 2008) (*Babylon II*) (denying reconsideration of *Babylon I*) and *Coastal Distribution, LLC v. Town of Babylon*, 216 Fed. Appx. 97 (2d Cir. 2007) (affirming district court’s grant of preliminary injunction against enforcement of stop work order, though permitting Babylon to seek review from STB).

conducting an independent business. NS pays RSI a fee for RSI's services; RSI does not pay any fees for use of the Facility. In contrast, in *Hi-Tech*, *Milford* and *Babylon*, the transloaders paid rent or fees to the rail carriers for the use of the yard. Moreover, the term of the NS-RSI operating agreement is 2 years, and NS has the right to cancel for any reason on 60 days' notice. In contrast in *Hi-Tech*, *Milford* and *Babylon*, the transloaders had, or contemplated having, leases or licensing agreements that were long-term agreements.

Third, NS holds itself out as offering transloading service at the Alexandria terminal as part of its common carrier service, and transloading is bundled with the transportation services that NS provides to ethanol shippers. Furthermore, none of the ethanol shippers who are using the Facility are affiliated with RSI. There is no evidence that RSI holds itself out as providing transloading service at the Facility or that RSI has any contractual relationships relating to the Facility with any of the ethanol shippers. Indeed, a provision in the NS-RSI operating agreement specifically provides that RSI does not have the right to market the Facility. By contrast, in *Hi-Tech*, *Milford* and *Babylon*, the third-party transloaders held themselves out as providing transloading service and had separate contractual relationships with customers for transloading and other arrangements. Other evidence supports the conclusion that RSI does not have the rights associated with an independent transloading-related business. For example, the record here shows that RSI does not set, invoice for, or collect transloading fees charged to the shipper; NS retained these rights. RSI receives a flat rate for each gallon of ethanol it transloads, regardless of the fee NS charges the shipper. RSI neither does, nor has the right to, market the Facility. RSI is not involved in the delivery of ethanol to the tank cars at the point of origin or the delivery of ethanol from the Facility to its final destination. By contrast, in *Hi-Tech*, *Milford* and *Babylon*, the third-party contractors had significant rights to provide transloading service as an independent business. In *Hi-Tech*, the third-party transloader contracted directly with shippers for the transportation of construction and demolition debris from the shippers' construction sites to the transloading facility and hired the trucks for the hauls. *Hi-Tech*, slip op. at 2. The third-party contractor set its own rates for the service. There was no evidence that the rail carrier quoted rates or otherwise charged shippers for use of the third-party transloader's facility. *Id.*, slip op. at 7. Similarly, in *Milford*, the third-party was conducting a transloading and steel fabrication business – including delivery of the material to customers' sites by truck – which it offered directly to customers on its own terms. *Milford*, slip op. at 3. There was no evidence that the rail carrier intended to hold out transloading as part of its services or that the rail carrier was in any way involved in the business

of transloading. *Id.* Likewise, in *Babylon*, the third-party transloader was entitled to charge a separate fee for transloading services, conducted all customer negotiations concerning transloading, and billed and collected the transloading fee from customers separately from the transportation charges. The third party transloader also had the right to enter into separate agreements with customers in its own name for disposition of commodities after rail transportation. *Babylon*, slip op. at 5.

Moreover, the record here shows that the areas where RSI plays a role in the operations of the Facility are directly related to the physical act of ethanol transloading. RSI coordinates with trucking companies regarding transloading schedules once RSI is aware of incoming shipments, and it directs NS when to move tank cars at the Facility to and from the transloading track. All of RSI's activities here are consistent with RSI's providing a contract service that is part of NS's rail transportation business, which includes transloading in this case. Alexandria has failed to show that the services RSI provides to NS here related to transloading differ from any other type of contract services that a rail carrier might utilize to conduct its business.

Id. at *3-4 (footnotes omitted).⁷

B. TCB, MAALT & Halliburton

1. Operations Prior to 2008. – Haliburton is a significant customer of both TCB and MAALT. Prior to 2008, TCB and MAALT transloaded frac sand for Halliburton in a relatively simple manner. TCB would locate, or “spot,” the railcar of sand next to a conveyor belt, MAALT would locate a trailer adjoining the railcar and open a port at the bottom of the car, gravity would pull the sand out of the bottom of the car onto the bottom of the conveyor, which would then lift the sand up and into the truck. MAALT owned and operated the conveyor equipment. This process required the TCB and MAALT personnel to be at the site at the same time and was relatively slow.

⁷*See also Norfolk Southern Ry. v. City of Alexandria*, 2009 WL 1011653 (E.D. Va. 2009) (finding preemption of municipal ordinance restricting ethanol transloading).

2. Construction of the Silo Project. – In the 2008 time frame, Halliburton desired to increase its frac sand deliveries beyond the capabilities of the conveyor equipment. Other parties sought the business, but the MAALT/TCB proposal ultimately won the day. Halliburton, MAALT and TCB ultimately agreed to construct an array of twelve silos to facilitate transloading frac sand. The use of silos had at least two virtues: (1) it increased the speed and volume of frac sand transloading; and (2) it decoupled unloading of the rail cars from loading of the trucks; those operations no longer needed to be simultaneous, so TCB could unload its rail cars during the day and MAALT could load its trucks in the evenings. TCB chose the location for the silos in the Transload Center and built the rail siding leading to the silo facility and associated roads (through its contractors). MAALT was not involved in this phase of the project and did not approve or review plans for this portion of the project. MAALT paid for the design and construction of the remainder of the facility, and TCB had the right to approve the plans. The Silo Project consists of (1) the rail spur, (2) a pit under the spur large enough for two rail cars at a time to unload their cargo of frac sand, (3) an elevator mechanism that lifts the sand from the pit into one of the silos, (4) a concrete foundation for the silos large enough for the delivery trucks to drive under the silos for loading, (5) the 3x4 array of silos themselves, and (6) scales. The silos themselves are approximately 85 feet tall; the entire facility, including the foundation and the elevator equipment at the top of the silos, is approximately 110 feet tall. The facility also includes roadways for trucks to approach the scales and silos and to leave, and a small building for

an office. MAALT wanted to place MAALT signage on the Silo Project, but TCB did not permit that.

Construction of the Silo Project began around September or October 2008 and finished in early 2009. The silos are not permanently attached to the foundation; rather, they are bolted to the foundation and could be unbolted and moved, if desired. Moving the silos would be a substantial undertaking, and there is no evidence in the record that any party contemplates moving the silos in the foreseeable future.

Concurrently with the Silo Project, and in association with that project, TCB constructed the track that would lead to the Silo Project and associated track in that area of the property. The associated project is sometimes separately referred to as the North Rail Loop, though at present it is not an actual loop. TCB's future plans include building the additional track to make an actual loop, but TCB does not have sufficient business as yet to justify the costs of construction. The costs of construction the North Rail Loop were funded by MAALT as part of the Silo Project. The parties sometimes discuss the North Rail Loop as something distinct from the Silo Project. The Court will, when necessary, distinguish between the two. TCB uses some of the North Rail Loop track for its other customers.

3. Operations Post-2008. – TCB approves all equipment and personnel MAALT uses at the Silo Project. MAALT must comply with TCB operating rules governing safety, housekeeping, and conduct at the Transload Center. MAALT does not conduct a separate business at the Transload Center. MAALT owns no real property interest at the Transload Center, nor does it have a leasehold interest. MAALT does not sell, process, manufacture,

or store long term any product at the Transload Center. MAALT has not used the Silo Project to transload for any customer except Halliburton. Other than a mention on its web site, there is no evidence in the record that MAALT has held out to the public its ability to transload using the Silo Project.

TCB, on the other hand, does hold out to the public its ability to provide transloading services at the Transload Center. TCB has and does transload for several customers other than MAALT and Halliburton. Presently, the MAALT/Halliburton transloading amounts to about 85% of TCB's business.

In terms of the day-to-day operation of the Silo Project, the two main line carriers that serve the Transload Center advise TCB of its expected delivery of rail cars. TCB determines where to place the arriving cars and switches the cars from the main line to the Transload Center. When MAALT is ready to unload the cars, TCB switches them to the Silo Project unloading pit, 8 to 10 at a time. When two cars are in position, TCB advises MAALT personnel that the cars are ready for unloading. MAALT personnel then test the car contents and open the port at the bottom of the car that permits the sand to drop into the pit. When the cars are unloaded, MAALT personnel then close the port on the car and advise TCB. This process is repeated for all the cars in the string. TCB then moves the empty cars to another part of the yard. At the appropriate time, MAALT personnel then activate the elevator mechanism that moves the sand from the pit into the appropriate silo.

Unloading the rail cars takes place during TCB's normal operating hours, 6:00 a.m. to 3:00 p.m., Monday through Friday. The Transload Center is fenced and not open to the

public. MAALT has a key to the facility and can (and does) operate outside TCB's normal business hours loading its trucks from the silos. TCB requires that MAALT maintain proper insurance and regulatory approval. TCB controls the speed that trucks can drive in the Transload Center. TCB controls the traffic flow of trucks on the facility, i.e., where they enter, how they proceed to the Silo Project, where they leave. MAALT identifies every MAALT truck that enters the Transload Center to TCB by license plate number and VIN.

MAALT does no processing of the frac sand. Title to the frac sand is with Halliburton during the entire transportation process.

4. Contractual Framework. – The economic reality of the Silo Project is that Halliburton will ultimately pay for the entire project and has exclusive use of the silos. This is effected through two agreements between TCB and MAALT, an agreement between MAALT and Halliburton, and TCB's posted tariffs.

Halliburton and MAALT entered into a Master Purchase Agreement effective November 1, 2008 (MAALT Ex. 6) (the "MPA"). The MPA provides that MAALT will construct the Silo Project at MAALT's expense and provide transloading services to Halliburton. Halliburton agreed to pay MAALT \$123,686 per month for five years. The monthly service fee is reduced by \$160 for every rail car transloaded. Additionally, Halliburton agreed to pay \$2.95 per ton of sand transloaded into a MAALT truck and a monthly rail spur fee of \$10,000. Halliburton also agreed with MAALT to pay certain fees directly to TCB, though TCB was not a party to the MPA. These included a track fee of \$50

per rail car placed on TCB track, a usage fee of \$50 per rail car unloaded into a silo, and a storage fee for rail cars on site more than two days of \$12 per day per rail car.⁸

TCB and MAALT entered into a Memorandum of Agreement effective June 15, 2008 (TCB Ex. 34) (the “Memorandum”). The Memorandum provided for MAALT to advance TCB’s construction costs for the Silo Project, subject to certain limitations. MAALT could earn back those construction costs by an allowance of \$160 per rail car transloaded until construction costs plus interest were repaid. (MAALT and TCB later orally agreed that TCB would extend the allowance directly to Halliburton.) The Memorandum further provided that the two main line carriers would pay TCB approximately \$300 per car switched to the TCB track, which would be billed directly to MAALT by the main line carriers. It also provided that TCB would charge \$50 per car for switching and \$50 per car for transloading. TCB billed these charges directly to Halliburton. The Memorandum expressly provides that it does not create any leasehold interest for MAALT in any part of the Transload Center. TCB owns the track, road, pit and silo foundation, MAALT owns the silos and associated equipment, such as the scales and elevator.

In addition, TCB from time to time published terms and conditions that governed its transloading services at the Transload Center. The Memorandum expressly referred to and incorporated TCB Tariff 201. The Memorandum also contemplated that TCB and MAALT would enter into a new transloading agreement upon completion of the Silo Project. That

⁸The actual transportation of the frac sand by truck from the Transload Center to Halliburton’s work sites is addressed by a separate agreement between MAALT and Halliburton.

agreement is Defendant Exhibit 70 (the “Transload Agreement”). Pursuant to the Transload Agreement, risk of loss for the frac sand shifts to MAALT once the rail car is spotted over the pit for unloading. *See* Transload Agreement, Ex. C, ¶ 3.⁹ The Transload Agreement requires MAALT to operate pursuant to TCB’s rules. Finally, the Transload Agreement incorporates by reference TCB Tariffs 001 and 201. TCB thus controls the manner of MAALT’s operations at the Transload Center.

The MPA and the Memorandum have matching five year terms.

C. MAALT Transloads Under the Auspices of TCB

Whether the Halliburton transloading is by a rail carrier is a close question. The principal fact for the Court’s analysis is that the Halliburton transloading is only part of the operations at the Transloading Center. TCB was transloading at the Transloading Center before MAALT, and continues transloading for customers other than MAALT. While the Halliburton/MAALT transloading supplies a substantial majority of TCB’s revenue at the Transloading Center, that may well not be the case forever. Moreover, the Halliburton/MAALT transloading takes only a relatively small portion, geographically, of the Transloading Center. TCB has marketed and continues to market its transloading services to the world, while MAALT, other than a mention on its web site, does not market its services at the Transload Center to anyone. That is for good reason. The Silo Project was bought and paid for by Halliburton, and Halliburton will not consent for any other party to

⁹Though TCB believes it still remains directly liable to Halliburton for damage to the sand up to the point the sand is loaded into a MAALT truck, notwithstanding any obligation MAALT may have to indemnify TCB. *See* Tr. I:129-31.

use the Silo Project. MAALT thus has no ability to provide transload services at the Transload Center to anyone but Halliburton.

This distinguishes the *Babylon* decisions, where the transloader, Coastal, ran the entire facility. MAALT has no leasehold in the Silo Project, much less the Transload Center as a whole. It simply conducts some operations on one small part of the Transload Center.¹⁰ It is relatively clear that, considering the Transload Center as a whole, TCB controls operations at the Transload Center.

Although it is a closer question, the Court finds that TCB also controls the Halliburton transloading operations, even viewing them in isolation. MAALT does not have a long-term lease or even any lease at all. The operative agreements have five year terms, and thus are not long term deals, but likewise are not subject to discretionary termination upon short notice. The Transload Agreement provides that MAALT will operate in accordance with TCB's rules, as set out in Exhibit B to that Agreement, and in accordance with TCB Tariffs 001 and 201. Although TCB did not design the Silo Project itself, it nonetheless had design review and approval authority. Moreover, while MAALT is not restricted from marketing its services at the Transload Center to third parties, it does not do so; TCB did not even permit MAALT to place its logo on the silos. TCB, in contrast, does market the availability of its transload services at the Transload Center to third parties.

¹⁰And unlike the processing of the C&D debris that was done in *Babylon*, MAALT does not perform any processing of the frac sand.

The economic reality here is not that the transloading entity pays the railroad to use the facility and collects all the revenue from the shipper, as in *Babylon*, or that the railroad pays the transloading entity a fee for its services and collects all the revenue from the shipper, as in *Alexandria*. Rather, here the economic reality is that Halliburton pays for everything. The record indicates that construction was funded with a loan to MAALT secured by Halliburton's agreement to pay MAALT monthly fees to cover the debt service. Halliburton pays TCB for its services, and Halliburton pays MAALT for its services (some of which indirectly pays TCB through the mainline switching charges).

These factors place the TCB-MAALT arrangement somewhere in the middle between *Babylon* and *Alexandria*. MAALT does not lease and operate the Transload Center. Conversely, MAALT is not simply a service provider that TCB pays for its services in transloading. The two entities are essentially partners in providing transloading services to their shared customer, Halliburton.

On balance, the Court finds that the Halliburton transloading takes place under the auspices of TCB. TCB has the leasehold for the Transload Center. TCB services other customers at the Transload Center, without any involvement of MAALT. TCB markets its services at the Transload Center to the public. TCB controls MAALT's operations through the Transload Agreement and TCB's Tariffs. Moreover, this result is consistent with the ordinary meaning of "under the auspices."

Under the auspices is frequently misconstrued as meaning "in the form of" or "in accordance with." Actually, it means "with the sponsorship or support of."

BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 92 (2d ed. 1995) (emphasis in original); *accord* RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 137 (2d ed. 2001) (defining “auspices” as “patronage, support, sponsorship”). The Halliburton transloading is certainly done with the support of TCB. The Court thus finds that the Halliburton transloading, as well as the other transloading done at the Transload Center constitutes transportation by a rail carrier.

III. HEIGHT RESTRICTIONS CANNOT LIMIT THE SILOS

The Transload Center is currently zoned LI (“light industrial”) by the City. In 2008, the City comprehensively rewrote its zoning categories and eliminated distinctions related to railroad uses. The City also amended its zoning ordinance expressly to exclude regulation of rail transportation:

Nothing in this section shall be construed to require classification of any new or unlisted use that constitutes transportation by rail carrier, nor shall any classification of uses listed in Section 4.4 be construed to regulate rail transportation.

City of Midlothian Ordinance 2008-31, § 4.2-4 (Defendant Ex. 6). The City’s Zoning Ordinance provides for a 35 foot height limit in LI zoned areas. The City argues that the Silo Project’s 110 foot height violates the Zoning Ordinance.

Initially, the Court notes that its determination that the Halliburton transloading constitutes transportation by rail carrier appears to exempt that from the City’s Zoning Ordinance. As quoted above, Ordinance 2008-31 expressly exempts rail transportation from regulation by the Zoning Ordinance. Having found that the Halliburton transloading constitutes transportation by a rail carrier, the Court holds that Ordinance 2008-31 exempts

the Halliburton transloading from regulation by the City's Zoning Ordinance. Thus, the 35 foot height restriction, by the Zoning Ordinance's own terms, does not apply to the Silo Project.

In the alternative, should the City attempt to otherwise enforce the height restriction notwithstanding Ordinance 2008-31, the Court will address the preemption question. The City argues that its zoning regulations, including the height restriction, fall within the health and safety exception to preemption. *See Green Mountain, supra*. As an initial matter, the Court finds that the City has failed to show that the height restriction protects public health and safety. While perhaps such a showing could be made, hypothetically, the City has failed to make such a showing on this record.¹¹ On this record, the only justification for the height limitation appears to be aesthetic. The Court does not mean that to be derogatory, and aesthetics is certainly a legitimate factor for a municipality to consider in its zoning requirements. It does not fall within the health and safety exception rationale, however.¹²

Finally, even if the height restriction protected public health and safety, the Court would still find it preempted as applied to the Silo Project. As the Fifth Circuit recently held, “[s]ubstantial interference with railroad operations will be preempted” *Franks Inv., supra*, at *8 (citation omitted). Imposition of the height restriction here would substantially

¹¹Although the Court has not located any authority specifically addressing the burden of proving the applicability of a health and safety exception, it seems natural that the party asserting the applicability of such exception, here the City, should bear the burden of proving its applicability.

¹²There is some irony in the City's attempting to close the Silo Project for aesthetic reasons, as immediately to the north of the Project, virtually within rock-throwing distance, sits one of the City's well-known cement plants, which literally dwarfs the Silo Project.

interfere with TCB's operations. TCB and MAALT could not accommodate Halliburton's desired increase in volume with the prior conveyor setup. The silos are not practical if limited to 35 feet. The effect of prohibiting structures taller than 35 feet would be to prevent the Halliburton transloading. Preventing the Halliburton transloading would substantially and unreasonably interfere with TCB's railroad operations at the Transload Center. The Court thus holds that application of the height limitation to the Silo Project is preempted as applied.

IV. GRADING REQUIREMENTS ARE PREEMPTED IN PART

The City's grading ordinance prohibits slopes steeper than 4:1¹³ without a variance. Defendant Ex. 14. TCB constructed the track embankment in accordance with standard railroad grades of 3:1, and in some cases 2:1; TCB also constructed some of the associated truck road with 3:1 embankment. The City offered some evidence that the grading ordinance was safety related in that a steeper slope increased the risk of structural failure and that the graded surface would slough off. The Court finds that the road embankment presents different issues than the rail embankment.

The Court holds that the grading ordinance is expressly preempted with regard to rail embankments. The Court finds that the grade of rail embankments is intrinsically part of the design and construction of tracks. The slope of rail embankments directly affects where rail can be located on a given property. It also affects the proximity one track can have to an adjoining track and the proximity a track can have to track side equipment. The undisputed

¹³This indicates a vertical change of 1 unit per 4 units of horizontal change.

evidence shows that industry standard for rail embankments is 3:1 and, in appropriate cases, 2:1. The Court finds that TCB constructed all of the rail embankments in the Silo Project and North Loop project in accordance with industry standards. “[T]here can be no state or local regulation of matters directly regulated by the [Surface Transportation] Board – such as the construction . . . of rail lines . . .” *Franks Inv., supra*, 593 F.3d at 404 (quoting *Barrios*, 533 F.3d at 332). The grading ordinance with respect to rail embankments would directly regulate the construction of rail lines, and thus is facially preempted.

The analysis is different with regard to the road. There is no evidence that the road construction was intrinsically related to rail construction, or any of the other activities that would trigger facial or categorical preemption. This implicates the “fact-based” test of as applied, or implied, preemption. “Under this fact-based test, state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation.” *Id.* at 414. TCB explained its use of the 3:1 slope for the truck drive as follows:

This three-to-one slope there, we did have room to provide a three-to-one slope. It is a flatter slope. It does provide a little easier for maintenance operations. We took into consideration the space that we had and the location of the roadway and anticipated additional future rail improvements that were planned, in addition to power line locations or power pole locations for a power line that was being installed into the site.

Tr. IV:223. In context, the answer appears to be explaining why TCB used a 3:1 slope instead of a steeper 2:1 slope. There is no evidence that using a 4:1 slope would unreasonably burden or interfere with rail transportation. Accordingly, the Court holds that

the grading ordinance is not preempted with respect to the road, and the road violates the 4:1 slope requirement.

V. PAVING REQUIREMENTS ARE NOT PREEMPTED

The City justified the requirement for concrete paved roads based on: (1) durability, (2) reduced dust, (3) reduced tracking of materials onto adjacent roadways in rain, causing slick areas and increasing risk of accidents, and (4) reduction of silt runoff into storm drains causing water quality issues. *See* Tr. III:101-03. The Court finds the last three justifications are legitimate health and safety issues. This again implicates the fact-based test. TCB explained its use of a “flex base” road surface primarily in terms of expense. TCB desires the flexibility to relocate roads as its use of the Transload Center changes without the expense of moving concrete roads. *See* Tr. I:184 (“[W]e don’t want to be paying the money to put in, you know, a lot of heavy duty concrete and then having to tear it up.”); Tr. IV:224 (“[I]t is probably one-fifth to one-fourth less expensive than, say, a concrete pavement street.”). TCB offered no evidence that complying with the City’s Standard Construction Details (Ordinance No. 2004-19, Defendant Ex. 8) would unreasonably burden or interfere with rail transportation. Accordingly, the Court holds that the Standard Construction Details are not preempted with respect to the newly constructed roads and parking areas associated with the Silo Project and the North Rail Loop project, and finds that those roads and parking areas violate the Standard Construction Details requirements.

VI. TCB DID NOT VIOLATE THE FLOOD PLAIN ORDINANCE

The City also asserts violations of its flood plain ordinance (Ordinance 2005-61, Defendant Ex. 10). The primary purpose of the ordinance is to prevent future flooding and, secondarily, to mitigate existing flooding. *See* Tr. III:104. This is a prototypical health and safety regulation. TCB offered no evidence that compliance with the flood plain ordinance would unreasonably burden or interfere with rail transportation. Accordingly, the Court holds that the flood plain ordinance is not preempted with respect to construction of the Silo Project and the North Rail Loop.

There was sharply conflicting expert testimony regarding whether the construction actually violated the flood plain ordinance. For the City, John Ivey testified that the construction raised the base flood elevation 0.81 feet and increased the flood discharge from the dam that flows downstream of the site. *See generally* Tr. III:190-91. On cross-examination, Mr. Ivey agreed that some of the changes he found were within the margin of error of the input data. *See* Tr. III:223-24.¹⁴ For TCB, Rick Lunsford testified that very little of the North Rail Loop project was actually in the floodplain, Tr. IV:229, and that any impact would be negligible. *See* Tr. IV:232. The Court finds both witnesses to be competent and credible, but on balance finds Mr. Lunsford's conclusion to be more persuasive. Accordingly, the Court finds that the 2008-09 Silo Project and North Rail Loop project construction did not violate the flood plain ordinance.

¹⁴Mr. Ivey relied on the report of Mr. Crawford, who also testified.

VII. OTHER FACTORS RELATING TO INJUNCTIVE RELIEF

If the City were allowed to enforce its preempted ordinances against TCB, it would shut down the Halliburton transloading, which constitutes some 85% of TCB's business. Enforcement of the preempted ordinances could well result in TCB's going out of business.

Enjoining the City from enforcing its preempted ordinances will have minimal impact on the City. Particularly in view of the adjoining industrial facilities, operation of the Transload Center at most provides a marginal increase to industrial activity in the area.

The public interest, as expressed by ICCTA, favors national regulation of rail transportation, rather than local regulation, for precisely the reasons shown by this case. The public interest here favors enjoining the City from enforcing its preempted ordinances against the Silo Project or the North Rail Loop project.

The Court therefore holds that the City is enjoined from enforcing its preempted ordinances against the Silo Project or the North Rail Loop project.

VIII. MONETARY PENALTIES ARE NOT APPROPRIATE

The City asks the Court to impose monetary penalties against TCB, MAALT, and TPT for violations of its ordinances. The Court has found all but two of those are preempted or not violated. The sole surviving claims relate to the roads built in connection with the Silo Project and North Rail Loop project, due to both grading and the type of road construction.

As an initial matter, the Court finds that MAALT and TPT have no liability for the road issues. MAALT was not involved in the design or construction of the roads at issue, other than peripherally. TPT was simply the lessor of the property. It had no involvement

in any of the disputes in this lawsuit other than collecting rent from TCB. That is not a proper basis for liability under any of the ordinances at issue.

The Court finds that monetary penalties against TCB in connection with the road construction are not appropriate. Rather than asserting its various ordinances in a good faith effort to obtain compliance, the City asserted its ordinances in an attempt to shut down the Transload Center or, at a minimum, to prevent the Silo Project and the North Rail Loop from operating.¹⁵ The City threw up so many attempted (and preempted) obstacles that TCB should be forgiven for having missed two relatively minor infractions among the City's deluge of unfounded assertions of violations that the Court has found were preempted. Moreover, TCB had a good faith belief that regulation of its road construction was likewise preempted.

In order to give TCB a reasonable time to either come into compliance or obtain a variance, the Court enjoins the City from enforcing the grading ordinance or the Building Standards against the roads and parking areas constructed in connection with the Silo Project or the North Rail Loop project for six months from the date of this Order.

¹⁵This is perhaps best shown by the testimony of John Garfield, the City's Director of the Department of Planning, who candidly testified that if TCB had requested variances from the City to construct the Silo Project and the North Rail Loop project – which the City contended was the appropriate process – he would have recommended against granting them. *See* Tr. III:48-49.

CONCLUSION

The Court has some sympathy for the City's frustration at having its planning thwarted by federal preemption. But, under ICCTA, the City cannot address that frustration by using local zoning and related ordinances to shut down rail development.

Signed April 8, 2010.

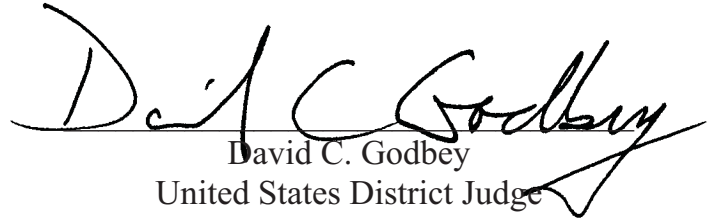

David C. Godbey
United States District Judge

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and)
JIMMY LEE WANECK,)
)
Plaintiffs,)
)
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. 1:17-CV-00106-HSO-JCG

Removed from the Circuit Court of
Harrison County, Mississippi
Second Judicial District

DEFENDANT’S MOTION TO SUPPLEMENT THE RECORD

Defendant CSX Transportation, Inc. hereby moves that the attached Order issued on June 19, 2017, in *Dee Voigt, et al. v. CSX Transportation, Inc., et al.*; *Hanna, et al. v. CSX Transportation, et al.* (Civil Action Nos. 3:17-CV-01018-N; 3:17-CV-01023-N) in the Northern District of Texas, Dallas Division (*Exhibit “A”*), be added as supplemental authority in this case. With this Order, Judge Godbey of the Northern District of Texas, addressing the same Biloxi bus-rail collision at issue here, finds complete preemption under the Interstate Commerce Commission Termination Act (“ICCTA”), creating a federal question that gives rise to federal court jurisdiction. Judge Godbey thus denied remand and retained the *Voigt* and *Hanna* actions.

Judge Godbey analyzes and applies the Fifth Circuit precedent germane to CSX Transportation, Inc.'s pending motion to dismiss based in part on ICCTA preemption. (ECF No. 10).

Date: July 19, 2017

Respectfully Submitted,

CSX Transportation, Inc.

BY: /s/Patrick R. Buchanan
PATRICK R. BUCHANAN
S. CAMILLE REIFERS

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2017, a true copy of the foregoing was filed with the Court used the CM/ECF system, which will send notice to the following:

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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 P*") 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.

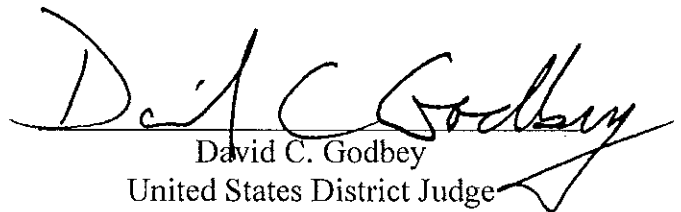

David C. Godbey
United States District Judge

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and
JIMMY LEE WANECK,

Plaintiffs,

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. 1:17-CV-00106-HSO-JCG

Removed from the Circuit Court of
Harrison County, Mississippi
Second Judicial District

MEMORANDUM IN SUPPORT OF CSX TRANSPORTATION, INC.’S
MOTION TO SUPPLEMENT THE RECORD

This Court has recognized that notices of supplemental authority are the proper procedural vehicle for bringing newly-issued authority to the Court’s attention. *United States ex rel. Stein v. Anixter Int’l Inc.*, No. 1:13CV110-HSO-RHW, 2015 WL 7582744, at *4 (S.D. Miss. Nov. 25, 2015). As other district courts have recognized, “filing notices of supplemental authorities that come to a party’s attention after briefing is complete is a well-established practice. Moreover, such practice is helpful to the Court, which of course always endeavors to apply current authority in resolving the issues before it.” *Hornor, Townsend & Kent, Inc. v. Hamilton and Hamilton*, 2004 WL 2284503 *11 (N.D. Ga. Sept. 30, 2004).

However, out of an abundance of caution and respect for opposing parties in this case,¹ CSXT first seeks permission from the court to have the Order issued on June 19, 2017 in *Dee Voigt, et al. v. CSX Transportation, Inc., et al.*; *Hanna, et al. v. CSX Transportation, et al.* (Civil Action Nos. 3:17-CV-01018-N; 3:17-CV-01023-N) in the Northern District of Texas, Dallas Division (*Exh. "A" to Motion*), be added as supplemental authority in this case. Because the newly-issued Order addresses the same Biloxi bus-rail collision at issue here, and is an application of Fifth Circuit precedent, CSXT submits that it may be helpful to the Court in this matter.

Date: July 19, 2017

Respectfully Submitted,

CSX Transportation, Inc.

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¹CSXT reads the local rules to allow the filing of a Notices of Supplemental Authority when such authority would be helpful to the Court. Several opposing parties, however, have indicated concern with Notices of Supplemental Authority, and instead have requested that CSXT submit such authority to the Court by motion, instead of notice. *See, e.g.*, Echo Transportation Solutions, LLC, and TBL Group, Inc.'s Memorandum in Support of Response to Defendant's Notice to Supplement the Record, filed July 11, 2017. (ECF No. 73).

CERTIFICATE OF SERVICE

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Exhibit 6

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

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

Plaintiffs,

v.

**CSX CORPORATION; CSX
TRANSPORTATION, INC.; ECHO
TRANSPORTATION SOLUTIONS,
LLC; TBL GROUP, INC.; JOHN
JOE;, ET AL.,**

Case No. 1:17-cv-00106-HSO-JCG

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CSX
TRANSPORTATION, INC.'S MOTION TO DEFENDANT'S MOTION TO
SUPPLEMENT THE RECORD**

Plaintiffs, by counsel, and for their response in opposition to Defendant CSX Transportation, Inc.'s (hereinafter "CSXT") Motion to Defendant's Motion to Supplement the Record (ECF No. 86) state as follows:

1. The case before this Court is a "simple negligence claim" based upon improper track maintenance. The only claims advanced by Plaintiffs in this case are for "improper maintenance." There are no claims for design and construction. Any representation by CSXT to the contrary is incorrect. Accordingly, the claims are not preempted.

2. The submitted *Voigt Order* is limited to design and construction claims.
3. The submitted *Voigt Order* finds preemption under the Interstate Commerce Commission Termination Act ("ICCTA"), but does not address claims of improper maintenance.
4. Based on the Federal Railroad Safety Act of 2007 Preemption Clarification Amendment ("FRSA"), Plaintiffs' claims for injuries are state causes of action and not preempted.
5. Alleged improper track maintenance issues in violation of the track safety standards and railroad rules are not to be preempted under the FRSA.
6. Resolving the typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the Surface Transportation Board ("STB").
7. Contemporaneously with this motion Plaintiffs are filing a memorandum in support of this response and incorporate that memorandum and all exhibits attached as if fully set forth herein.
8. Plaintiffs attach here to Exhibit 1, the unpublished opinion in *Elam v. Kan. City S. Ry. Co.*, 465 Fed. Appx. 369; 2012 U.S. App. LEXIS 6404 (5th Cir. 2012)

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request CSXT's Motion to Defendant's Motion to Supplement the Record be denied, considered as related to design and construction claims only and for such further relief the Court deems just and equitable.

Respectfully submitted,

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I hereby certify that I have on this 2nd day of August, 2017, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT CSX TRANSPORTATION, INC.'S
MOTION TO DEFENDANT'S MOTION TO SUPPLEMENT THE RECORD**

EXHIBIT 1

Elam v. Kan. City S. Ry. Co., 465 Fed. Appx. 369; 2012 U.S. App. LEXIS 6404 (5th Cir. 2012)
An Unpublished Opinion

Waneck v. CSX Corporation, et. al.
United States District Court for the Southern District of Mississippi, Southern
Division
Case No. 1:17-CV-00106-HSO-JCG



**BARBARA ELAM; BOBBY ELAM, Plaintiffs - Appellees v. THE KANSAS CITY
SOUTHERN RAILWAY COMPANY; RONALD L. MICHAEL, Defendants -
Appellants**

No. 11-60363

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

465 Fed. Appx. 369; 2012 U.S. App. LEXIS 6404

March 26, 2012, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Northern District of Mississippi. USDC No. 1:08-CV-304. *Elam v. Kan. City Southern Ry. Co.*, 2011 U.S. Dist. LEXIS 55564 (N.D. Miss., May 23, 2011)

DISPOSITION: AFFIRMED in part; DISMISSED in part.

COUNSEL: For BARBARA ELAM, BOBBY ELAM, Plaintiffs - Appellees: Casey Langston Lott, Esq., Duncan Lee Lott, Esq., Langston & Lott, P.A., Booneville, MS.

For KANSAS CITY SOUTHERN RAILWAY CO., Defendant - Appellant: Charles Edwin Ross, Esq., Dennis Jason Childress, Esq., Wise Carter Child & Caraway, P.A., Jackson, MS.

For RONALD L. MICHAEL, Defendant - Appellant: Charles Edwin Ross, Esq., Wise Carter Child & Caraway, P.A., Jackson, MS.

JUDGES: Before JOLLY, DAVIS, and BARKSDALE, Circuit Judges.

OPINION

[*370] PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

This is the second appeal in this matter. See *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011). After reviewing the briefs, hearing oral argument, reviewing the parties' supplemental briefs, and considering pertinent parts of the record, we have concluded that, on remand following the first appeal, the district court committed no error in remanding all claims remaining [**2] in federal court to state court. We further conclude that we lack appellate

465 Fed. Appx. 369, *370; 2012 U.S. App. LEXIS 6404, **2

jurisdiction over the district court's order denying summary judgment in favor of Kansas City Southern Railway (KCSR) on the grounds that although the order denying summary judgment preceded the remand order in both logic and fact, the order is not conclusive of any claim and that KCSR's asserted defenses may be properly considered and addressed in state court. *See Regan v. Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008).

AFFIRMED in part; DISMISSED in part.

Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and
JIMMY LEE WANECK

Plaintiffs,

v.

CSX CORPORATION; CSX
TRANSPORTATION, INC.; ECHO
TRANSPORTATION SOLUTIONS,
LLC; TBL GROUP, INC.; JOHN JOE,,
ET AL.,

Defendants.

Case No. 1:17-cv-00106-HSO-JCG

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR RESPONSE IN
OPPOSITION TO DEFENDANT'S MOTION TO SUPPLEMENT THE RECORD**

Plaintiffs, by counsel, and for their memorandum in support of their response in opposition to Defendant's Motion to Supplement the Record (ECF No. 86) state as follows:

CSXT has submitted the *Voigt Order*¹ with the suggestion that "it may be helpful to the Court in this matter." (ECF No. 87, p. 2) Plaintiffs agree that it may be very helpful, but for reasons drastically different than the ones CSXT would focus upon.

In the *Voigt Order*, the Court specifically noted that the Plaintiffs in those cases "claim the crossing's **design and construction** was ultra-hazardous." (emphasis added) (ECF No. 86-1, p. 8) Accordingly, the Court in *Voigt* determined that those claims were preempted by the Interstate Commerce Commission Termination Act ("ICCTA") which provides the Surface Transportation Board ("STB") exclusive jurisdiction over the design and construction of railroad

¹ *Voigt, et al v. CSX Transportation, Inc., et al*, U.S. District Court of Northern District of Texas, Dallas Division, Civil Action No. 3:17-CV-01018-N, Doc. 31, hereinafter referred to as the *Voigt Order*. (ECF No. 86-1)

facilities. (ECF No. 86-1, p. 10) Waneck Plaintiffs recognized and agree that claims based upon improper “design and construction” of railroad facilities are completely preempted by the ICCTA as being under the “exclusive” jurisdiction of the STB. (*see* 49 U.S.C. § 10501(b)) In this case, Waneck Plaintiffs specified in their Amended Complaint that there are no claims for improper “design or construction” of the Main Street crossing in Biloxi. The only claims advanced by Plaintiffs in this case are for “improper maintenance.”²

Contrary to the specifically pleaded allegations by Waneck Plaintiffs, CSXT has represented to this Court that Plaintiffs’ complaint “alleges” that this crossing “should have been designed, constructed, and or configured differently.”³ This representation is just incorrect. CSXT fails to acknowledge paragraph 50 in the Amended Complaint⁴ which affirmatively states that there are no claims for improper “design or construction.” Paragraph 50 is the only time the words “design” and “construction” are in the Amended Complaint. A review of paragraph 8 in the Notice of Removal (ECF 1) reveals the railroad’s effort to “reframe” the allegations in Plaintiffs’ Amended Complaint as attacks upon the “design and construction” of the Main Street Crossing.⁵ In addition to attempting to reframe the allegations, CSXT pulled excerpts from the Amended Complaint and CSXT failed to include portions of paragraphs that refer specifically to

² Paragraph 50 of the Amended Complaint reads “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.” (ECF No. 1-1, pg 51)

³ The *Notice of Removal* (ECF 1) begins paragraph 8 as follows: “The Complaint takes issue with the Biloxi crossing. It alleges that its geometrical configuration and shape should have been designed, constructed, and/or configured differently...” (ECF No. 1, pg 2)

⁴ *id* at footnote 2

⁵ Paragraph 8 in the *Notice of Removal* (ECF 1) reads as follows: The Complaint takes issue with the Biloxi crossing. It alleges that its geometrical configuration and shape should have been designed, constructed, and/or configured differently, and that operation of a train through a crossing with this one's physical characteristics is a violation of state tort law. Am. Compl. ~ 25 (the Biloxi crossing "is a dangerous and severely inclined or 'humped' crossing"); *id.* (the crossing is "dangerous" due to "automated CSX railroad maintenance practices"); *id.* ~ 44 ("The Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad" in creating a "severe incline or hump"); *id.* (ECF No. 1, pg 2-3)

maintenance.⁶ Whether CSXT inadvertently or intentionally represented the nature of the improper maintenance claims that are actually being advanced in this case, does not change the fact that no design or construction claims are alleged. CSXT knows it has no defense for its improper maintenance practices. That is why CSXT desperately attempts to make this a “design and construction” case, which it is not.

The *Voigt Order* finds preemption under the ICCTA, but does not address claims of improper maintenance. Track “maintenance” issues do not fall within purview of the ICCTA. Track maintenance is governed by the Track Safety Standards (49 CFR Part 213). These Track Safety Standards were promulgated under the Federal Railroad Safety Act (hereafter the FRSA) which has its own preemption clause. (See 49 CFR 213.2 and 49 USC 20106). The FRSA 2007 Preemption Clarification Amendment makes it undeniable that Plaintiffs’ claims for injuries are state causes of action:

(b) Clarification regarding State law causes of action.--(1) Nothing in this section 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).

⁶ CSXT quotes as follows from paragraph 44 of the Amended Complaint: "The Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad" in creating "a severe incline or 'hump'". Obviously omitted are those parts of paragraph 44 which specify that it was "maintenance activities at the Main Street Crossing" which altered "the vertical alignment of the crossing and its approaches". (ECF 1-1, pg 50) CSXT quotes from paragraphs 25 and 45 of the Amended complaint suffered from similar omissions.

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

(c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

Section 20106(b)(1)(A)-(C), (2), (c) Title 49, U.S. Code.

Plaintiffs have already provided argument and authorities to establish that the FRA, and not the STB, is responsible “for every area of railroad safety.” (ECF No. 34, pg. 11-12) The STB has explicitly approved findings that FRSA preemption should apply to rail safety issues. (ECF No. 34, pg. 12) Finally, Plaintiffs have also provided the history of *Lundeen I* and *Lundeen II* cases which fully document the fact that improper track maintenance issues in violation of the track safety standards and railroad rules will not be preempted under the FRSA. (ECF No. 34, pg. 15-22)

The *Voigt Order* submitted by CSXT by its own terms finds “complete preemption” under the ICCTA, (ECF No. 86-1, pg. 3) and CSXT acknowledges this finding of complete preemption. (ECF No. 86, pg. 1) The *Voigt Order* and CSXT both ignore the decision of the Fifth Circuit, *en banc*, in *Franks Investment Company, LLC v. Union Pacific Railroad*, (593 F.3d 404) (5th Cir. 2010); wherein the Court found that “Resolving the typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the STB.” In *Franks*, the Court rejected the argument that crossing disputes are subject to “express preemption.” After failing to cite *Franks* in its Motion to Dismiss Plaintiffs’ Amended Complaint Pursuant to Fed.R.Civ.P.12(b)(6) and Memorandum in Support (ECF No. 9 and 10) or in its Notice of Removal (ECF No. 1), CSXT tries to distinguish *Franks* in its Rebuttal in Support of CSX Transportation, Inc.’s Motion to Dismiss (ECF No. 47) However, in *Elam v.*

Kan. City S. Ry. Co., 635 F.3d 796 (5th Cir. 2011), the Fifth Circuit made no effort to distinguish the *Franks* case from cases with simple negligence claims. The Court stated, as follows:

A typical negligence claim seeking damages for a typical crossing accident (such as the *Elams*' simple negligence claim) does not directly attempt to manage or govern a railroad's decisions in the economic realm. Like state property laws and rules of civil procedure that generally "have nothing to do with railroad crossings," the effects of state negligence law on rail operations are merely incidental. *Franks*, 593 F.3d at 411. Accordingly, we conclude the ICCTA does not expressly or completely preempt the *Elams*' simple negligence claim.

The case before this Court is a "simple negligence claim" by the Waneck Plaintiffs based upon improper track maintenance. *Elam* and *Franks* stand for the proposition that ICCTA preemption does not apply. The 2007 FRSA Preemption Clarification Act expressly rules out preemption under the FRSA as cited above.

CSXT cited *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011) for the proposition that plaintiffs' claims are preempted because Congress enacted the ICCTA and created the Service Transportation Board to regulate rail transportation in the United States, and to "implement a federal scheme of minimal regulation for this intrinsically interstate form of transportation." (ECF No. 10, pg 5). CSXT failed to advise this court that *Elam* was remanded to the District Court to determine whether the simple negligence claims were preempted. *Elam* at page 815. The District Court, upon remand, determined that the negligence claims were not preempted and remanded the negligence claims to State Court. *Elam v. Kan. City S. Ry. Co.* 2011 U.S. Dist. LEXIS 55564 (N.D. Miss May 23, 2011) The Fifth Circuit then affirmed the remand to state court in an unpublished opinion on May 23, 2012. *Elam v. Kan. City S. Ry. Co.*, 465 Fed. Appx. 369; 2012 U.S. App. LEXIS 6404 (5th Cir. 2012) (Exhibit 1)

The *Voigt Order* submitted by CSXT is an example of what can happen when a railroad is allowed to "reframe" what a case is about. The *Voigt Order* accepted the railroad's position

that plaintiffs in those cases were making claims that “the crossing’s design and construction was ultra hazardous.” (ECF No. 86-1, pg. 8) The Court went on to accept the apparently uncontroverted evidence submitted by CSXT in the form of two declarations.⁷ (ECF No. 86-1, pg. 9-10) These declarations rolled out a parade-of-horribles that would occur if CSXT were forced to “reconfigure” the crossing. The declarations first expanded the issues to include other crossings, then speculate that there may be issues getting governmental approvals for the newly created possibility of multiple road closings and finally implied that this massive hypothetical undertaking could jeopardize national defense. (ECF No. 86-1, pg. 9-10) All these allegations are total nonsense. This case is about one accident at the Main Street crossing in Biloxi. This damage suit “does not directly attempt to manage or govern a railroad's decisions in the economic realm.” (See *Elam* quote, above) Even if we follow the railroad’s mis-direction about being forced to fix the crossing, the roadway approaches to the Main Street crossing can be raised without even affecting rail traffic. Any attempt to bring in a similar parade-of-horribles in this case will be countered with real evidence to expose and rebut the misdirected, slippery-slope argument contained in the declarations that were not contested in *Voigt*.

CONCLUSION

Voigt is based upon claims that challenge design and construction. Waneck Plaintiffs have made no such claims. Waneck Plaintiffs have affirmatively stated that they are NOT making any claims based upon “design and construction” of the crossing. Waneck Plaintiffs are making negligent maintenance claims concerning only the Main Street crossing in Biloxi. The FRSA, and not the ICCTA, governs any preemption issues related to the maintenance claims in this case. The FRSA preemption provision was specifically amended in 2007 to clarify that claims for personal injuries like the ones in this case are not preempted. The Court should

⁷ The Order makes no reference to any controverting declarations.

review the *Voigt Order* as an example of how pleading errors, issue reframing by CSXT and un rebutted declarations can transform simple negligence claims into “design and construction” claims which are completely preempted by the ICCTA. The *Voigt Order* is in contrast with and not similar to the case at hand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of August, 2017, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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Exhibit 8

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and)
JIMMY LEE WANECK,)
)
Plaintiffs,)
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. 1:17-cv-00106-HSO-JCG

Removed from the Circuit Court of
Harrison County, Mississippi
Second Judicial District

**REBUTTAL IN SUPPORT OF
CSX TRANSPORTATION, INC.’S MOTION TO SUPPLEMENT THE RECORD**

Defendant CSX Transportation, Inc. (“CSXT”) by and through undersigned counsel, respectfully files this Rebuttal in Support of CSXT’s Motion to Supplement the Record (ECF No. 86) as follows:

1. The Opposition first insists that *Hanna/Voigt* involved claims of design and construction, whereas this case is “only” about “improper maintenance,” and that “[t]rack ‘maintenance’ issues do not fall within the purview of the ICCTA.” This is wrong in law because maintenance claims have no special standing in ICCTA jurisprudence, and are regularly held preempted. The Opposition is also wrong in fact because both the *Hanna/Voigt* actions and this *Waneck* action take aim at the Biloxi rail crossing’s design, its construction, and its maintenance. The point, as Judge Godbey recognized, is that mere labeling does not drive

preemption analysis. Whether the Biloxi crossing's configuration was achieved through maintenance practices or initial design, the claims attack the configuration of the track structure.

2. The Opposition next suggests that Judge Godbey misapplied the law of ICCTA preemption, in three respects. *First*, they say Judge Godbey overlooked a dichotomy in preemption law between crossing design and construction claims (preempted) and maintenance claims (not preempted). There is no such dichotomy. *Second*, the Opposition accuses Judge Godbey of overlooking "the historic police powers of the states to protect the health and safety of their citizens." Courts reject the Opposition's suggestion that safety regulations resting within police powers are some special category immune to ICCTA preemption. *Third*, and finally, the Opposition says that Fifth Circuit "methodology" requires courts to examine "each claim of negligence to determine" whether preemption applies. That is correct, and that is what Judge Godbey did.

3. The Opposition finally lampoons two declarations submitted by CSXT personnel with relevant knowledge as "self-serving" and "total nonsense." Judge Godbey rightly reviewed and credited this evidence.

WHEREFORE, PREMISES CONSIDERED, for the reasons as more fully set forth in the Rebuttal Memorandum in Support of CSXT's Motion to Supplement the Record, Defendant CSXT respectfully requests that the supplemental authority be granted. Dismissal is in order.

This the 9th day of August, 2017.

Respectfully submitted,

CSX TRANSPORTATION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, a true copy of the foregoing was filed with the Court used the CM/ECF system, which will send notice to the following:

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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

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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’s 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

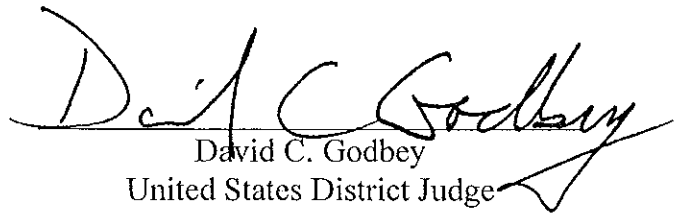
reconfiguring the Biloxi crossing to avoid the allegedly “ultra-hazardous” grading and slope would unreasonably burden CSXT’s operations. Specifically it would require closing the Biloxi crossing temporarily to reconstruct the crossing itself, and likely other crossings nearby to keep the track level. 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



STATE OF TEXAS }
COUNTY OF DALLAS }

I, FELICIA PERE, Clerk of the District of Dallas County,
Texas, do hereby certify that I have compared this instrument
to the original and a true and correct copy of the original as appears on
record in my office.

GIVEN UNDER MY HAND AND SEAL of said County, at office
in Dallas, Texas, this 10th day of April, A.D. 2017

FELICIA PERE, DISTRICT CLERK
DALLAS COUNTY, TEXAS

By [Signature] Deputy

Tonya Pointer

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., LOUIS
 AMBROSE, JR. AND JOHN DOES.

Defendants.

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

44TH JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED 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.; LOUIS AMBROSE, JR. AND JOHN DOES 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 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, 9314 WEST JEFFERSON BLVD, DALLAS, TEXAS, 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 BY SERVING ELISA FOX, 801 CHERRY STREET, UNIT 46 FORT WORTH, TEXAS, 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 BY SERVING E. MURRAY MOORE JR. AT 215 S. MONROE

STREET, SUITE 200, TALLAHASSEE, FL 32302.

2.5 DEFENDANT, LOUIS AMBROSE, JR., WAS THE DRIVER OF A PASSENGER BUS INVOLVED IN THE ACCIDENT GIVING RISE TO THIS LAWSUIT. DEFENDANT IS AN INDIVIDUAL BELIEVED TO BE EMPLOYED BY ECHO, DEFENDANT LOUIS AMBROSE, JR., IS BELIEVED TO RESIDE AT 2109 JOYNER RANCH RD., FORT WORTH, 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 BY SERVING CT CORPORATION SYSTEM AT 1999 BRYAN STREET, SUITE 900, DALLAS, TEXAS 75201-3136.

2.7 Defendant, JOHN DOE was the conductor of the train involved in the accident giving rise to this lawsuit. Defendant is an individual believed to be employed by and/or an agent of CSX Transportation Inc.

2.8 Defendant, JOHN DOE was the engineer of the train involved in the accident giving rise to this lawsuit. Defendant is an individual believed to be employed by and/or an agent of CSX Transportation Inc.

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, 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. The 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 Transportation Inc., railroad maintenance practices.

4.3 After the collision, 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 Louis Ambrose, Jr., 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 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 train collisions since 1976. Several of these prior accidents have involved motorists either stuck or stopped on the crossing.

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 Defendant Louis Ambrose, Jr., 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 Louis Ambrose, Jr., 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) failure to act as a reasonable and prudent person would have done; and
- (d) failing to abide and/or observe by traffic signs.

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

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 importance of following a prescribed route, 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 Louis Ambrose, Jr., 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, Inc., 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 Defendant CSX Transportation, Inc. is liable for the conduct of Defendants John Does under the doctrine of *respondeat superior* because John Does, at all relevant times, acted within the course and scope of their employment for CSX Transportation,

Inc. At the time of the incident, Defendants John Does was operating the train in the course and scope of his employment and/or agency for Defendant CSX Transportation, Inc. Defendant CSX Transportation, Inc. intentionally granted Defendants, John Does the authority to act on behalf of CSX Transportation, Inc. The relevant acts of Defendants John Does were performed while in the employment of CSX Transportation, Inc., to further its business, to accomplish the objective for which Defendants, John Does were hired, and within the scope of his employment or within the authority delegated to them. Defendant, CSX Transportation, Inc., therefore, is vicariously liable for the negligence of Defendants, John Does.

6.3 Defendant, CSX Transportation Inc., 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.

6.4. Defendants, CSX Transportation Inc., and John Does 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: failure to operate the train at a speed that allowed the train in time to avoid collision for the existing conditions; failure to keep a proper lookout; failure to inspect, report, repair unsafe conditions at the crossing; and failure to brake, slow, or stop in a reasonable manner.

6.5 The negligence of Defendants, CSX Transportation Inc., and John Does on the occasion in question was a proximate cause of the occurrence in question and the injuries and the damages of Plaintiffs.

6.6 CSX Transportation, Inc., 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, Inc. 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, Inc., failed to act reasonably, because, at the time of the subject collision, the railroad failed to prevent the ultra hazardous conditions.

6.7 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, deceased, 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.

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 down 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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was on this day forwarded to the counsel of record listed below on this 24th day of March, 2017.

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FRANCISCO GUERRA, IV.

Exhibit 9

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK; and
JIMMY LEE WANECK,

Plaintiffs,

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. 1:17-CV-00106-HSO-JCG

Removed from the Circuit Court of
Harrison County, Mississippi
Second Judicial District

**REBUTTAL MEMORANDUM IN SUPPORT OF
CSX TRANSPORTATION, INC.’S MOTION TO SUPPLEMENT THE RECORD**

Plaintiffs and co-defendants (collectively “the Opposition”) ask this Court to turn a blind eye to Judge Godbey’s June 21 ruling in the parallel Texas *Hanna/Voigt* actions finding complete preemption under ICCTA. Yet there is much the Opposition concedes. “There is no dispute,” the Opposition acknowledges, “that the accident between the Echo bus and the CSXT train is the same accident forming the basis of this case.” Co-Defendants’ Opp’n at 2 (ECF Nos. 105 and 107).¹ The Opposition cannot deny that the cases feature the *same* Biloxi bus-train collision; the *same* Biloxi rail crossing; the *same* Biloxi crossing design and configuration; the

¹Co-defendants’ Opposition collectively refers to both the co-defendants’ responses (ECF Nos. 105, 109) and the separate cross-claimant Ambrose’s response (ECF No. 107), which are nearly identical. For ease of reference, subsequent citations only refer to the ECF No. 105 paper.

same purported “humped” grade of crossing; and the *same* types of passenger injury claims. They cannot deny that the Texas complaints and the complaint here assert the *same* causes of action and, nearly verbatim, many of the *same* theories of negligence. They cannot deny that Judge Godbey applied the *same* Fifth Circuit law that applies here. They do not even deny that Judge Godbey’s ruling *is correct* at least in large measure: “Waneck Plaintiffs recognize[] and agree that claims based on improper ‘design and construction’ of railroad facilities are completely preempted by the ICCTA. . . .” Plaintiffs’ Mem. at 2 (ECF No. 103).

The Opposition nonetheless offers three reasons why this Court should resist the persuasive force of Judge Godbey’s analysis and ruling. Each of the three is in error.

1. The Opposition first insists that *Hanna/Voigt* involved claims of design and construction, whereas this case is “only” about “improper maintenance,” and that “[t]rack ‘maintenance’ issues do not fall within purview of the ICCTA.” Plaintiffs’ Opp’n at 1 (ECF No. 102); Plaintiffs’ Mem. at 3; Co-Defendants’ Opp’n at 7. This is both wrong in law and wrong in fact. It is wrong in law because maintenance claims have no special standing in ICCTA jurisprudence, and are regularly held preempted. *See, e.g., JieAo & Xin Zhou – Pet. for Declaratory Order*, S.T.B. No. FD 35539, 2012 WL 2047726, at *7 (S.T.B. served June 6, 2012) (claims preempted if they would “affect the amount and type of maintenance that could be performed on [a] railroad ROW”); *Waubay Lake Farmers Ass’n v. BNSF Ry. Co.*, Civ. No. 12-4179, 2014 WL 4287086, at *6 (D.S.D. Aug. 28, 2014) (ICCTA preempted claims for damages resulting from alleged failure to maintain a culvert running beneath a track); *Maynard v. CSX Transp.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (ICCTA preempted claims that railroad failed to maintain drainage on a railcrossing). After all, “maintaining an active rail line” necessarily entails “actions”—just like design and construction—that clearly are part of transportation by

rail carriers,” hence within ICCTA’s vast preemptive scope. *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1146 (8th Cir. 2015) (internal quotation marks omitted). The Opposition reckons with none of this law.

The Opposition is also wrong in fact because both the *Hanna/Voigt* actions and this *Waneck* action take aim at the Biloxi rail crossing’s design, its construction, and its maintenance. The Opposition would have this Court believe that *Hanna/Voigt* featured only theories of design and construction, so that Judge Godbey “does not address claims of improper maintenance.” See Plaintiffs’ Mem. at 1-3; Co-Defendants’ Opp’n at 6-7. That remarkable assertion is belied by Judge Godbey’s express affirmation that “[p]laintiffs assert CSXT failed to *maintain* the Biloxi crossing because of the crossing’s steep grade, which made it ultra-hazardous.” *Voigt* Order at 5 (DI 31) (emphasis added), attached hereto as Ex. A. It is also belied by simple comparison of both sets of complaints, which reveals that:

- Both complain of the “humped” configuration of the Biloxi crossing. Compare *Waneck* First Am. Compl. ¶ 46 (ECF No. 1-1 at 40) (“The humped condition rendered the Main Street Crossing unsafe for motorists and extra-hazardous, ultra-hazardous, and unusually dangerous.”) with *Voigt* First Am. Compl. ¶ 4.2 (DI 1-1) (“The crossing consists of several layers of asphalt patches. These asphalt patches create a steep inclined [sic] or hump.”), attached hereto as Ex. B.
- Both assert that the Biloxi crossing’s geometrical configuration, height, and shape are “dangerous” and negligently so. Compare *Voigt* First Am. Compl. ¶ 4.2 (“The crossing consists of several layers of asphalt patches. These asphalt patches create a steep inclined (sic) or hump. This hump has been created and gradually grown overtime [sic] by automated [CSX] railroad maintenance practices.”) with *Waneck* First Am. Compl. ¶ 25

(“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 (sic) or hump.”).

- Both insist that the Biloxi crossing should have been maintained differently.

Compare Voigt First Am. Compl. ¶ 6.6 (“CSX Transportation, Inc., [sic] had a duty to maintain the . . . crossing where the incident occurred, including the duty to maintain the condition of the roadway. . . . [CSXT] owed a duty to the driving public to act reasonably when maintaining the subject railroad crossing. . . .”) *with Waneck* First Am. Compl. ¶ 44 (alleging CSXT “allowed maintenance activities at the [crossing] to alter the vertical alignment of the crossing and its approaches, thereby creating a severe incline or ‘hump’”).

The point, as Judge Godbey recognized, is that mere labelling does not drive preemption analysis. Whether the Biloxi crossing’s configuration was achieved through maintenance practices or initial design, the claims attack the configuration of the track structure. The Opposition’s after-the-fact wish to recast their negligencetheories as meaningfully distinct from those in *Hanna/Voigt* is understandable given Judge Godbey’s ruling. But that wish does not make it so.

2. The Opposition next suggests that Judge Godbey misapplied the law of ICCTA preemption, in three respects. *First*, they say Judge Godbey overlooked a dichotomy in preemption law between crossing design and construction claims (preempted) and maintenance claims (not preempted). There is no such dichotomy, as just shown. Curiously, the Opposition’s lone authority for this notion is *Elam v. Kansas City Southern Railway Co.*, 635 F.3d 796 (5th Cir. 2011), which they claim stands for the proposition that ICCTA does not apply to “simple

negligence claims” against railroads “based upon improper track maintenance,” Plaintiffs’ Mem. 5; Co-Defendants’ Opp’n at 3. *Elam* in fact says no such thing. Nor does any other holding of this Circuit.

Rigid, categorical distinctions like the one the Opposition proposes have no place in ICCTA preemption law because, as Judge Godbey observed, ICCTA’s focus is on *the effect* of a regulation (in this case a lawsuit) in governing or managing rail transportation, a job reserved to the Surface Transportation Board. As explained in *Elam*, “our inquiry is whether Mississippi’s negligence law, as applied to the facts of this case, would ‘*have the effect* of unreasonably burdening or interfering with’ [the railroad’s] operations.” 635 F.3d at 813 (emphasis added) (citation omitted). *Elam* permitted certain negligence claims to proceed, and found certain others preempted, by engaging in allegation-specific assessment of the claims before it, not by mechanical application of categorical rules.²

The Court in *Franks Investment Co. v. Union Pacific Railroad Co.* said the same. 593 F.3d 404, 414 (5th Cir. 2010). The Opposition gravely miscasts *Franks*, suggesting it held that “[r]esolving the typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the STB.” Plaintiffs’ Mem. at 4 (quoting *Franks*, 593 F.3d at 411). Yet plaintiffs manage to omit the pivotal next sentence, which states: “The relevant question under the ICCTA is whether Franks’ railroad crossing dispute invokes laws that *have the effect* of managing or governing, and not merely incidentally affecting, rail transportation.” *Id.* (emphasis added).

Judge Godbey thus followed *Elam* and *Franks* to the letter in rejecting categorical rules:

² Plaintiffs brazenly suggest that Judge Godbey was unaware that negligence claims in *Elam* were remanded and survived due to CSXT’s “fail[ure] to advise” of this fact. Plaintiffs’ Mem. at 5. This is a blatant falsehood. CSXT did so advise, and, far from being unaware, Judge Godbey discusses this very point. See *Voigt* Order at 8.

[S]uch 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 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."

Voigt Order at 6-7 (quoting *Elam*, 635 F.3d at 807). Finding the claims before him to have the effect of managing railroad decisions, Judge Godbey rightly found preemption.

Second, the Opposition accuses Judge Godbey of overlooking "the historic police powers of the states to protect the health and safety of their citizens." Co-Defendants' Opp'n at 6 (quoting *Elam*, 635 F.3d at 814 [sic]). In truth, "Congress made no blanket exception for a state's police power when describing the ICCTA's preemption scope... . the state retains its traditional police power in terms of public health and safety *except where the state's actions regulate rail transportation.*" *In re Katrina Canal Breaches Consol. Litig.*, Civ. A. No. 05-4182, 2007 U.S. Dist. LEXIS 95799, at **127-28 (E.D. La. Dec. 27, 2007) (emphasis added) (citation omitted). Courts reject the Opposition's suggestion that safety regulations resting within police powers are some special category immune to ICCTA preemption. Indeed, plaintiffs in *Elam* tried the Opposition's approach, and were rebuffed:

The Elams point out that their negligence *per se* claim, unlike the negligence *per se* claim at issue in *Friberg* [*v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir.2001)], involves "safety issues." But focusing on the Elams' particular reason for enforcing Mississippi's antiblocking statute misses the point. Regardless of why the Elams brought their negligence *per se* claim, the effect of the claim is to economically regulate KCSR's switching operations.

Elam, 635 F.3d at 807. In short, "[e]ven if plaintiffs' claim is construed as one to enforce the state's traditional police power to protect the health and safety of its citizens, the

claim is preempted by ICCTA.” *In re Katrina*, 2007 U.S. Dist. LEXIS 95799, at **127-28. That is what Judge Godbey found, correctly so.

Third, and finally, the Opposition says that Fifth Circuit “methodology” requires courts to examine “each claim of negligence to determine” whether preemption applies. Co-Defendants’ Opp’n at 4. That is correct, and that is what Judge Godbey did. Focusing on effect and not in wooden fashion on categories, the Court correctly considered whether “a judgment for the plaintiffs necessitate changes in design and construction of railroad tracks and crossings.” *Voigt* Order at 7. The Court looked at plaintiffs’ “exact claims,” as the Opposition says a court must, and found them to assert failings not only in design and construction but in maintenance—that “[p]laintiffs assert[ed that] CSXT failed to *maintain* the Biloxi crossing because of the crossing’s steep grade, which made it ultrahazardous.” *Id.* at 5 (emphasis added). The court then resolved that plaintiffs’ claims, if permitted to proceed, would have the effect of governing rail transportation:

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.”

Id. at 9 (quoting *Battley v. Great W. Cas. Ins. Co.*, Civ. A. No. 14–494–JJB, 2015 WL 1258157, at *5 (M.D. La. Mar. 18, 2015)). Judge Godbey’s holding, and reasoning, faithfully apply the law of this Circuit.

3. The Opposition finally lampoons two declarations submitted by CSXT personnel with relevant knowledge as “self-serving” and “total nonsense.” Plaintiffs’ Mem. at 6. What they are, in reality, is evidence. CSXT went to the effort of establishing—with evidence,

submitted under oath—the substantial injurious effects these lawsuits would have on the nation’s rail transportation. Judge Godbey rightly reviewed and credited this evidence. *Voigt* Order at 9-10. The Opposition now counters not with evidence but with lawyer rhetoric and aspersion. The Opposition does acknowledge that in *Hanna/Voigt* these declarations were “apparently uncontroverted evidence.” Plaintiffs’ Mem. at 6. That is correct. These declarations, which, as the Opposition helpfully notes, “exist in this case” as well (Co-Defendants’ Opp’n at 5), are evidence. And they are likewise uncontroverted here.

* * *

It bears recalling, in closing, that the standard for complete preemption is more demanding than the standard for ordinary preemption. *See Elam*, 635 F.3d at 803 (“As a general matter, complete preemption is less common and more extraordinary than defensive or ordinary preemption.” (quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331 (5th Cir. 2008))). If, as Judge Godbey finds, these lawsuits are completely preempted by ICCTA, then most assuredly they also are preempted.

The supplemental authority should be permitted. Dismissal is in order.

This the 9th day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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