

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CSX TRANSPORTATION INC.,</b>	:	
<b>Plaintiff</b>	:	<b>No. 04-CV-5023</b>
	:	
<b>v.</b>	:	<b>Judge Kauffman</b>
	:	
<b>CITY OF PHILADELPHIA,</b>	:	<b>Filed Electronically</b>
<b>Defendant</b>	:	

**MEMORANDUM OF LAW IN SUPPORT OF CSXT'S MOTION  
TO STRIKE, OR IN THE ALTERNATIVE TO DISMISS, APPLICANTS'  
MOTION TO RENEW INTERVENTION OR FILE AS *AMICUS CURIAE***

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## **I. FACTS AND PROCEDURAL HISTORY**

On October 26, 2004, CSX Transportation, Inc. (“CSXT”), filed a Complaint with claims for declaratory judgment, preliminary injunction, breach of contract and promissory estoppel asserted against the City of Philadelphia (“City”) for the City’s failure to perform its obligations to erect a barricade and prevent public trespass over CSXT’s right-of-way into the Schuylkill River Park (“Park”), including in the areas of Race and Locust streets. The City filed a Motion to Dismiss the promissory estoppel claim on December 23, 2004, and has not filed its Answer to the Complaint to date.

CSXT filed its Motion for Preliminary Injunction on November 19, 2004. The City responded on December 13, 2004. On or about December 20, 2004, Applicants filed a Motion to Intervene and a Memorandum of Law in Support. As required by the Rules of Civil Procedure, along with the Motion, Applicants filed their proposed pleading consisting of a Complaint for declaratory relief, and counterclaims against CSXT to provide notice as to what role Applicants would play were they granted intervener status.

CSXT filed its response to the Motion to Intervene on or about December 30, 2004. In its Memorandum of Law in Opposition to Applicants’ Motion to Intervene, CSXT argued that Applicants lacked Article III standing in addition to failing to

establish the elements necessary for intervention, to include a legally protectable interest in the subject matter of the litigation. In particular, CSXT cited Third Circuit authority that supports the legal presumption of adequacy of representation by a governmental entity like the City— a presumption that the Applicants must rebut.

On January 5, 2005, the motions for intervention and preliminary injunction were scheduled for hearing before the Honorable Bruce W. Kauffman. At the outset, the Court stated that it did not find that Applicants established grounds for intervention as of right or permissively, because they shared an identity of interests with the City that the City adequately represented. The Court stated that lacking inadequacy of representation, the Applicants could not, at this stage, qualify for intervenor status. The Court also pointed out that Applicants' standing was in question, and that the Applicants also had not satisfied the required amount in controversy necessary for federal diversity jurisdiction.

On January 14, 2005, the City proposed in a submission to the Court what it considered to constitute an effective barricade for purposes of the remedy needed to protect the public safety through the preliminary injunction. CSXT filed its response to the City's submission on January 26, 2005, in which it stated that the City's proposal provided positive grounds for discussion and requested a 45-day stay of the

proceedings for negotiations with the City. The Court subsequently orally granted CSXT's request.

Applicants renewed their Motion to Intervene, or in the alternative for leave to file a brief as *amicus curiae* on January 21, 2005 (hereinafter "Applicants' Motion" or "Motion"). The Applicants state in their multi-purpose Motion at Paragraph 32 that they concur with the City's proposal. As the Applicants' Motion did not assert grounds to support either its renewed intervention, or for leave to file as *amicus curiae*, it is legally insufficient on its face for either purpose, and consists instead of redundant, immaterial and impertinent matter that is irrelevant to the proceeding, which should be struck in this Court's discretion, or in the alternative be dismissed as CSXT requested in its motion. This brief is filed in support of that motion contemporaneously herewith.

## II. ISSUES PRESENTED

1. Whether the Applicants' Motion to Intervene or to file a brief as *Amicus Curiae* and the *Amicus Curiae* Brief should be struck in accordance with CSX Transportation, Inc.'s Motion when Applicants' Motion consists entirely of immaterial and impertinent matter not to be considered by this Court, or in the alternative be dismissed because their Motion is legally insufficient on its face, lacking grounds to support their requested status?

*[Suggested Answer in the Affirmative.]*

2. Whether the Applicants' Motion for Leave to file an *Amicus* Brief should be dismissed because the Applicants cannot set forth facts to show that their interests are inadequately represented by the City?

*[Suggested Answer in the Affirmative.]*

3. Whether the Applicants' Motion for Leave to File an *Amicus Curiae* Brief, and the *Amicus Curiae* Brief, with attachments, should be struck because the Applicants failed to establish cause to file a brief as an *amicus* and as a non-party cannot submit materials to be considered by this Court?

*[Suggested Answer in the Affirmative.]*

### III. ARGUMENT

Applicants have not set forth grounds to renew their Motion to Intervene, or to support a petition to file an *amicus curiae* brief to be considered by this Court in deciding the preliminary injunction motion. The Court was clear that, at present, Applicants have not shown that the City is not adequately representing their interests.<sup>1</sup> The Court was also clear that unless or until inadequate representation is established, Applicants cannot be accorded party status as intervenors. Applicants also have failed to establish that they possess an expertise or present new and useful facts that necessitate their participation as *amicus curiae*. Because the Motion fails on its face to assert grounds for intervenor or *amicus* status, this Court should strike it as immaterial, or dismiss it as facially legally insufficient.

Further, Applicants cannot submit to this Court as ‘evidence’ documents appended to its Motion/*Amicus* Brief that are beyond the scope of the litigation. *Amicus* status is not equal to that of a party, and only a party may submit materials to be considered by the Court. Thus, these improperly appended and referenced materials must be struck as improperly submitted evidence not of record.

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<sup>1</sup> Although the Court stated all the elements for intervention seem to be present other than inadequate representation, (*see* Hearing Transcript, p. 13), CSXT opposes Applicants’ Motion to Intervene for failing to have Article III or jurisdictional standing and failing to show a legally protectable right or interest that will be adversely affected by the outcome of the litigation which are the necessary grounds for intervention, in addition to inadequate representation.

The only matter currently before the Court is whether the City's failure to erect an effective barricade at Race and Locust has real potential for irreparable harm in loss of life and limb to the public, and mental anguish and trauma to the crew that are witness to or will be involved in the inevitable accident caused by public pedestrian trespass to the Park via the gaps in fencing, to compel closure while litigation on the merits continues. Applicants' submission does not assist the Court in its disposition of this crucial matter, and has no place before it.

**A. The Applicants' Improper Submission to this Court Should Be Struck, or In the Alternative Dismissed as Legally Insufficient.**

A court may, upon motion of a party, or *sua sponte* "order stricken... any redundant, immaterial, impertinent, or scandalous matter." F.R.C.P. 12(f). The contents of Applicants' multi-purpose motion fails to set forth the grounds necessary for either a motion to intervene, or a motion for leave to file an *amicus* brief. Accordingly, the contents of the Motion are immaterial. Moreover, the Motion consists largely of matters not before this Court and not pertinent to the dangers presented by pedestrians crawling through CSXT's parked trains in order to access the Park without using the marked entrances, which CSXT seeks a preliminary injunction to prevent.

A motion to strike acts to exclude irrelevant and improper material from the Court's consideration in the interest of the expeditious and efficient administration of justice. *See United States v. 416.81 Acres of land*, 514 F.2d 627 (7<sup>th</sup> Cir. 1975). The matter contained within Applicants' Motion and *Amicus* Brief qualify as "redundant," "immaterial" and "impertinent" matter that would be properly struck under Rule 12(f).<sup>2</sup> In the context of a motion to strike, "redundant" has been defined as "facts which are wholly foreign to the issue intended to be denied, or the needless repetition of immaterial averments." *See Burke v. Mesta Mach. Co.*, 5 F.R.D. 134 (W.D. Pa. 1946). "Immaterial" has been defined as "matter having no essential or important relationship to the averment intended to be denied, or a statement of unnecessary particulars in connection with, and as descriptive of, what is material" or relevant to the case. *Id.* Applicants' Motion contains claims which question CSXT's authority to park trains in the areas of the crossings when its operational needs require and as it and its predecessors have done for over 100 years without complaint. Such claims are not relevant to the central issue presently before the Court, *i.e.*, what the City

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<sup>2</sup> In their zeal, Applicants assert claims and arguments that are not properly submitted to a court in a Motion to Intervene or to participate as *amicus*. Applicants' 'Motion' is mistitled, and in content is more similar to a pleading that is subject to a motion to strike than a motion that should explain to the court the grounds for the relief sought. The Motion contents, if submitted by the City, could be struck as immaterial and impertinent, and should be so struck here.

promised to erect as a “permanent effective barricade,” and thus constitute immaterial matter that this Court should strike.

Further, Applicants have no expertise to lend their opinions credence. Applicants utilize their Motion to submit their non-expert *opinion* that the danger is *not* caused by the pedestrian trespass at points which the parties agreed were to be barricaded, but is allegedly instead caused by the presence of the stopped trains at the crossings themselves. *See* Applicants’ Motion at ¶¶3-7, 12-18. The necessity of stopped trains and blocked crossings introduce rail configuration issues, and matters that are subject to Interstate Commerce Commission Termination Act (“ICCTA”), Pub. L.No. 104-88, 109 Stat. 803 (1995), 49 U.S.C. §§ 701-727, 10101-16105, preemption.<sup>3</sup> Moreover, these allegations lack merit, are immaterial and do not consist of an assertion of standing, a legally protectable interest, or an allegation of the City’s inadequate representation. They are therefore impertinent and are improperly asserted in Applicants’ Motion.

Applicants’ allegations in paragraphs 3-28 of their Motion present extraneous and complicated issues regarding operational issues and corporate policies, which are

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<sup>3</sup> ICCTA, which is governed by the Surface Transportation Board, expressly preempts all matters implicating rail configuration or train operations, *see* 49 U.S.C. § 10501(b)(1)(2), and specifically preempts local enforcement of a law pertaining to a train’s obstruction of a crossing. CSXT was reasonable in its reliance upon the City of Philadelphia’s non-enforcement of blocked crossing laws/ordinances even before the field was covered by ICCTA in 1996.

not before the Court at this time. The Applicants' opinion that the safety dangers at Race and Locust streets stem from the presence of the trains themselves rather than the pedestrian trespass across the right-of-way upon which the trains are lawfully operating does not provide new or useful information to the Court. The Applicants do not offer facts that contradict the material and unrefuted fact that there currently exists no effective barricade at Race and Locust streets, based upon the Applicants' own assertion that thousands of pedestrians trespass on the CSXT right-of-way to access the Park each week. It is also undisputed that these repeated instances of pedestrian trespass constitute a real and imminent threat of danger to the public.

Applicants' Motion and contents of their *Amicus* Brief are also impertinent because they consist of statements of matters applied to facts which do not relate to the matter in question, and which are not necessary to deciding the matter in question. *See Burke, supra*. The alleged safety of pedestrians at other crossings, that may be of another type, and involve different traffic patterns, train travel patterns and differing physical characteristics, are impertinent because they interject new facts irrelevant to the matters of contract and public safety at the Schuylkill River Park before the Court.<sup>4</sup> The Applicants' arguments cannot assist the Court in its determination of

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<sup>4</sup> The photos Applicants rely upon in Exhibit 2 of their Motion to support their argument for pedestrian at-grade crossings are not even relevant to this proceeding, as the photos either do not depict CSXT crossings or depict incomparable crossings. The top photo on the fourth page of the Exhibit shows a private crossing used by CSXT to access its own facilities. The tracks on

what constitutes an effective barricade at Race and Locust streets. Those streets are left open, as though inviting Park access, in contrast to the promised closure of the remainder of the tracks alongside the Park performed in accordance with the City's agreement.

Contrary to Applicants' characterization, CSXT does not have the burden at this preliminary stage to "show that it has done everything in its power to park trains across these crossings only when truly necessary and to otherwise reduce the danger of trespassing through parked trains." Motion at ¶18. Aside from being immaterial to its purported Motion for intervener or *amicus* status, this statement of the legal burden is materially false, and serves to confuse the matter before this Court. To refute CXST's likelihood of success on the merits, the City bears the burden of justifying its inaction and non-compliance with its obligations to protect the public safety at the gaps to which it directs pedestrians. Because the Motion consists entirely of impertinent or immaterial matter, it should be struck, or in the alternative dismissed for failure to state legal grounds to warrant its submission.

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the first page of the Exhibit are not used by trains, but are instead infrequently used to set high railers, *i.e.*, vehicles which can operate on both roadways and railroad tracks, on and off the tracks. The remainder of the photos depict lower volume industrial tracks owned by Consolidated Rail Corporation.

**B. Applicants' Multi-purpose Motion and Brief, Including Attachments, Should Be Struck as Immaterial and Impertinent Matter.**

Lacking party status, the Applicants are limited in the filings they may make to this Court. Applicants may file motions to persuade this Court to confer upon them a status that will permit them to make filings to which a party may be obligated, or obliged, to respond. Under Rule 24, Applicants may seek to intervene, but in the motion must set forth the grounds for intervention. Applicants failed to set forth such grounds in their “renewed” Motion.

Although there is no rule of civil procedure governing the contents of a motion for leave to file a brief as an *amicus curiae*, the district courts within the jurisdiction of the Court of Appeals for the Third Circuit have determined that such a motion should include explanation of the entity’s interest as an *amicus*, and the means by which permitting an *amicus* filing will assist the court, as well as an explanation as to why an *amicus* is needed given the parties’ respective positions. The purpose of *amicus* filings is to assist the Court by offering expertise or new and useful information which would expedite disposition of the matter. *See, e.g., Waste Mngmt. of Pa., Inc., v. City of York*, 162 F.R.D. 34 (M.D. Pa. 1995) (granting EPA leave to file *amicus* brief to assist with CERCLA matter). Applicants complicate and clutter the

straightforward matter of contract interpretation before the Court, and thus obfuscate the judicial process rather than assist it.

**1. Applicants did not show inadequate representation by the City, and do not submit their Motion to Intervene as required under Rule 24.**

Applicants' Renewal of Motion to Intervene should be struck for failing to comport with Rule 24 requiring that "the motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." F.R.C.P. 24(c). Applicants failed to include a pleading with their motion, and do not assert the grounds for their motion as are required.

Applicants also did not file a brief in support of their renewed Motion to Intervene to, and provide no basis in their Motion for this Court to conclude that their interests are not adequately represented by the City. The averments in Applicants' Motion reveal that it is not a renewed Motion to Intervene so much as a diatribe attacking CSXT's position with respect to the preliminary injunction, which Applicants are not at liberty to submit to this Court absent a legally cognizable status.

At the hearing on January 5, 2005, this Court declined to grant intervention to Applicants, holding the petition in abeyance, because "the City will adequately represent their interests." Hearing Tr. p. 21. As CSXT pointed out in its brief in opposition to Applicants' original Motion to Intervene, the Third Circuit requires that

inadequate representation be shown affirmatively, and the legal presumption favors adequate representation when a party is a governmental entity like the City. Since the date of the hearing, there have been no filings before the Court that show a change in the City's interest, shared with Applicants, to maintain public at-grade pedestrian access to the Park at Race and Locust Streets. The City has not filed an Answer or New Matter, and at least until that time, there is no argument to be made that the City will fail to advance arguments to represent the Applicants' interests. The City has also not otherwise indicated that it no longer represents that interest, nor given the Court cause to believe that it is not diligently litigating the matter. The City has made no filings to reveal its position with the exception of the City's proposal for an effective barricade with which the Applicants concur. Because Applicants fail to assert grounds for inadequate representation, and their Motion remains pending before this Court, their renewed Motion to Intervene should be struck as premature and consisting of immaterial and impertinent material or, dismissed as legally insufficient on its face. It is appropriate to move to strike a Motion to Intervene that does not make the requisite showing for intervention. *See, e.g., Sea Hunt Inc., v. Shipwrecked Vessel*, 182 F.R.D. 206 (E.D. Va. 1998) (striking United States Motion to Intervene for failing to show interest in the subject matter of the litigation). CSXT should not be compelled to respond substantively to any motion filed by Applicants that does not allege

grounds for their party (or *amicus*) status, particularly when responding may prejudice itself.

**2. The Motion for Leave to File a Brief as *Amicus Curiae* on its face fails to assert grounds for *amicus curiae* participation.**

“*Amicus curiae*” means friend of the court, historically used to describe an “impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another.” *Sciotto v. Marple Newtown Sch. Dist.*, 79 F.Supp.2d 553, 554 (E.D. Pa. 1999) (*amicus* request denied as it had no ‘special’ interest, its interest was adequately represented, and it offered no particular information of use).

Appearance of an *amicus curiae* may be heard only by leave of court, *United States v. Michigan*, 940 F.2d 143 (6<sup>th</sup> Cir. 1991), and the motion must set forth the grounds for serving the court as a “friend.” As Applicants have not shown they are deserving of impartial “friend of the court” status, and fail to supply reasons for their submission, their Motion for Leave and proposed *Amicus* Brief should be struck as immaterial, or dismissed for legal insufficiency.

The Motion for Leave to file as an *amicus* must show that the petitioner: (1) possesses a “special interest” in a particular case; (2) that the petitioner’s interest is not represented competently or at all in the case; (3) that the proffered information

with the *amicus* brief is timely and useful; and (4) that the petitioner is not partial to a particular outcome in the case. *See Sciotto, supra*. Applicants' Motion does not contain the elements that have been recognized as necessary, and further, does not satisfy the grounds for a petition for leave to file an *amicus* brief.

Although there is no Federal Rule of Civil Procedure governing *amicus* briefs, the district courts look to the interpretation of Federal Rule of Appellate Procedure 29(b), pertaining to leave to file *amicus* briefs on appeal. *See Abu-Jamal, supra*. Under Rule 29(b)(2), the *Amicus* Brief must state "why an *amicus* brief is desirable." Applicants fail to support their sought-after *amicus* status in their brief, which begins with attacks upon CSXT's arguments and ends with the assertion of new arguments constituting impertinent matter. Moreover, *amicus* briefs are to supplement a party's filing to the Court, and be filed seven days after a party's submission; *amicus* are not permitted to file briefs on their own initiation. Applicants' proffered *amicus* brief on the injunction request would be untimely under Appellate Rule 29(b) as briefs on the injunction were due in December. Were Applicants' proposed brief meant to supplement the City's proposal regarding an effective barricade, it is superfluous as Applicants concur with the City. *See Applicants' Motion* ¶32.

Federal courts have routinely denied petitions for leave to file briefs as *amicus curiae* when it is unnecessary because the party's interest is adequately represented.

*See Abu-Jamal v. Horn*, 2000 WL 1100784 (E.D. Pa.)(citing *Sciotto, supra*); *Yip v. Pagano*, 606 F.Supp. 1566, *aff'd*, 782 F.2d 1033 (3d Cir. 1975); *Liberty Lincoln v. Ford Mktng Grp.*, 149 F.R.D. 65, 82 (D.N.J. 1993); *see also Amer. College of Obst. & Gyn. of Pa, v. Thornburgh*, 699 F.2d 644 (3d Cir. 1983); *NOW, Inc., v. Scheidler*, 223 F.3d 615 (7<sup>th</sup> Cir. 2000); *but cf. Neonatology Assoc., v. CIR*, 293 F.3d 128 (3d Cir. 2002) (partial persons who did not show inadequate representation permitted to file as *amici* in appellate proceedings where relevancy and additional criteria of Rule 29 otherwise met).

Here, the inadequacy of representation has not been shown, and lacking that or new, useful and relevant facts to inform the Court, the Motion is legally insufficient, and should be dismissed, or denied with prejudice.

The fact remains that an *amicus* cannot take the reins of the case from the parties, and continue as a litigating *amicus*. *See United States v. Michigan, supra*. Since an *amicus* may only respond to filings, not initiate them, *see Waste Mngmt., supra*, Applicants are not properly situated to file as *amicus*. At this point, there are no pleadings to which their brief could be responsive. The only thing Applicants' Brief is responding to is the preliminary injunction hearing itself, where the party status it dons here was withheld.

Motion for leave to file an *amicus* brief should show that the participation of the amicus is necessary, and justify the sought participation through assistance to the Court that it cannot do without. When there is no indication provided by the proposed *amicus* that the parties properly before the court will not adequately present the relevant legal arguments to the court, there is no showing of the necessity of the *amici*. *See Northern Sec. Co., v. United States*, 191 U.S. 555, 24 S.Ct. 119 (1903) (denying leave to serve as *amicus* when the applicant does not show interest in any other case affected by the decision of the case at bar and the parties are represented by competent counsel, so no need of assistance is shown). Here, Applicants did not set forth the necessity of its participation as an *amicus*, and therefore have not supported a Motion for Leave.

Applicants clearly align themselves with the City of Philadelphia in their submission as an *amicus*, and in fact state that they “agree with the City of Philadelphia’s submission” as to an assertedly effective barricade, and thus have no separate interest to represent before the Court. *See Applicants’ Motion* ¶32. Thus, Applicants cannot also assert that the City fails to adequately represent their interests in obtaining public at-grade pedestrian access points. Partiality, while not fatal to a petition for leave to file as an *amicus* to a matter before an appellate court that has the potential to create binding precedent, (*accord Neonatology Assocs., supra*), has been

held to be an important eliminator at the district court level whereby petitions are within the court's discretion to accept. *Id.*; *Abu-Jamal, supra*, citing *Goldberg v. Phila.*, 1994 U.S. Dist. Lexis 9392 (E.D. Pa. 1992).

Applicants do not possess expertise in a particular area of the law and cannot offer their 'legal' opinions in a scholarly capacity (*e.g.*, law professors in *American College of Obstetricians*), or as an expert in the field (*e.g.*, EPA in *Waste Management*). Applicants are unqualified to allege in their Motion that CSXT is the source of public safety concerns due to its temporary blocking of the areas of Race and Locust streets, which have not been crossings that cannot be blocked. The City, recognizing the limited issue before the Court at the preliminary injunction stage, stated that for purposes of the preliminary injunction hearing *only*, it would agree that CSXT must block the areas at Race and Locust streets at times to conduct its train operations. The City was not willing to relinquish that argument, and may argue it on the merits. Because it was not necessary for the injunction hearing, CSXT did not present exhaustive evidence regarding the necessity of blocking Race and Locust to conduct its train operations. Such arguments involve matters of ICCTA preemption beyond this Court's jurisdiction. *See* fn. 3, *supra*.

Applicants' Motion and proposed brief attacks CSXT's arguments for preliminary injunction and its alleged corporate policy regarding at-grade crossings.

Applicants do not possess any authority or special knowledge of CSXT’s purported policy, and cannot speak with any authority on it. Thus their opinions to the Court are irrelevant and clutter the issues rather than clarify them.

Applicants have no authority to state as a purported fact to this Court that “CSXT’s Corporate Policy Regarding Grade Crossings Is Not Absolute,” particularly when the contents of and attachments to their Motion and Brief that are offered in support of that position contain factual inaccuracies and cloud the issue of the immediate need for an effective barricade at Race and Locust by raising the Rails to Trails program, and other matters pertaining to crossings that are dissimilar to the crossings sought at bar.

Applicants have submitted to this Court inaccurate, bordering upon misleading, information. Although the Court stated that it was “pretty obvious from the contract that [the City has] an obligation at the very least to construct a permanent effective barricade, whatever that may mean,” (Hearing Tr. p. 117), and recommended to CSXT to move on to irreparable harm (Tr. p. 59) as success on the merits was “almost absolute,” (Tr. p. 122), Applicants attack CSXT for not showing its likelihood of success. Such attacks do not belong in a Motion for Leave or an *amicus* brief, and should be struck as impertinent.

Applicants submit to the Court irrelevancies in the guise of ‘facts’ regarding CSXT’s alleged position with respect to at-grade crossings, and the asserted possibility of peaceful pedestrian and at-grade crossing coexistence. The statistical ‘evidence’ and photographs do not shed light on the meaning of “effective barricade,” and do not share an informed opinion as to what could serve as an effective barricade until the merits are determined. The public safety issues relative to the requested at-grade crossings at Race and Locust streets are unique, and cannot be elucidated through random selection of photographs and unanalyzed statistics. What is or is not permitted at other crossings, involving different factual circumstances and legal statuses does not assist the Court in interpreting what will constitute an “effective barricade” that will protect the public safety.

Applicants draw the Court’s attention to websites of the Federal Railroad Administration, and lacking any pertinent expertise, advocate that the at-grade public pedestrian access the City and Applicants seek is *not unsafe* according to their interpretation of the statistics cited there. These characterizations amount to no more than Applicants’ non-expert opinion. The Public Utility Commission, which is *the* state authority on rail-highway crossings, at least those argued to be public as these are, has determined that an at-grade crossing at Locust Street would be too dangerous, and would be antithetical to its obligation to protect the public safety. *See* PUC

Opinion and Order attached to CSXT's Brief in Support of its Motion for Issuance of a Preliminary Injunction at Exhibit "A".

**3. The materials appended to Applicants' submission are not properly submitted to this Court for consideration and may be struck.**

CSXT also moves to strike the documents attached to Applicants' proposed *Amicus Curiae* Brief. Documents appended to an *amicus curiae* brief are not proper evidence and are properly stricken. *See, e.g., Metcalf v. Daley*, 214 F.3d 1135, 1141, n.1 (9<sup>th</sup> Cir. 2000)(Humane Society granted leave to file as an *amicus*, but documents not of record properly stricken from the brief). A non-party such as an *amicus* is not authorized to enter photographs or documents into evidence, as *amici* "cannot initiate, create, extend, or enlarge issues." *Waste Mngmt., supra* at 36 (cited in *United States v. Alkaabi*, 223 F.Supp.2d 583, 593 (D. N.J. 2002)).

In addition to consisting of materials that are not evidence which may be made of record, the documents appended to the Applicants' submission are immaterial and impertinent submissions that confuse rather than clarify the issues before the Court. Some of the materials presented as 'evidence' do not even apply to CSXT. *See* fn. 4 *supra*. The supposedly authenticated photographs of CSXT crossings appended to the brief are either not the same type of crossing (*e.g.*, industrial or private), or are not

a CSXT crossing or even a train crossing. Accordingly, each of the attachments to the Motion/Brief submission, including the newspaper article purported to be of the Wall Street Journal, the contract purported to be between CSXT and the City of Jacksonville, Florida, the irrelevant photographs, and the list of incidents asserted to have been printed from the Federal Railway Administration website, should be struck.

#### IV. CONCLUSION

For the foregoing reasons, CSX Transportation, Inc.'s Motion to Strike, or, in the Alternative, to Dismiss Applicants' renewed Motion to Intervene, offered in the alternative as a Motion for leave to file an *amicus curiae* brief, and the proposed *Amicus Curiae* Brief, should be granted, and the submissions excluded from this Court's consideration.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

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***Counsel for Plaintiff, CSX Transportation, Inc.***

Date: February 14, 2005

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CSX TRANSPORTATION INC.,</b>	:	
<b>Plaintiff</b>	:	<b>No. 04-CV-5023</b>
	:	
<b>v.</b>	:	<b>Judge Kauffman</b>
	:	
<b>CITY OF PHILADELPHIA,</b>	:	<b>Filed Electronically</b>
<b>Defendant</b>	:	

**CERTIFICATE OF SERVICE**

**AND NOW**, on the date stated below, I, **Benjamin C. Dunlap, Jr., Esquire**, of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day served the foregoing **Memorandum of Law in Support of Motion of CSX Transportation Inc., to Strike Applicants' Motion and Amicus Brief** by electronic filing and by United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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