UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02453-KLM

ROCK & RAIL LLC, a Colorado limited liability company,

Plaintiff,

v.

MOTHERLOVE HERBAL COMPANY, a Colorado corporation, INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC., a Colorado nonprofit corporation, ROCKIN S RANCH LLC, a Colorado limited liability company, JOHN CUMMINGS, an individual, DAVID KISKER, an individual, GARY OPLINGER, an individual, WOLFGANG DIRKS, an individual, and JAMES PIRAINO, an individual,

Defendants.

DEFENDANTS' ANSWER AND COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino (collectively, the "Neighborhood Defendants"), by and through undersigned counsel, hereby respectfully answer the Complaint for Declaratory and Injunctive Relief (the "Complaint") filed by Plaintiff Rock & Rail LLC ("Rock & Rail") in the above-captioned action as ECF No. 1 and assert their counterclaim for declaratory and injunctive relief as follows:

DEFENDANTS' ANSWER

1. The first sentence of Paragraph 1 of the Complaint sets forth a legal conclusion to which no response is required and the Neighborhood Defendants therefore deny the same. The

Neighborhood Defendants are without knowledge as to the allegations in the second sentence of Paragraph 1 of the Complaint and therefore deny the same. The Neighborhood Defendants are without knowledge as to the allegations in the third sentence of Paragraph 1 of the Complaint and therefore deny the same. The Neighborhood Defendants are without knowledge as to the allegations in the fourth sentence of Paragraph 1 of the Complaint and therefore deny the same. The Neighborhood Defendants are without knowledge as to the allegations in the fifth sentence of Paragraph 1 of the Complaint and therefore deny the same. The Neighborhood Defendants are without knowledge as to the allegations in the sixth sentence of Paragraph 1 of the Complaint and therefore deny the same. The Neighborhood Defendants are without knowledge as to the allegations in the seventh sentence of Paragraph 1 of the Complaint and therefore deny the same.

2. The Neighborhood Defendants affirmatively aver that the real property that is more particularly described as Lot B of Recorded Exemption, RE-2803; being a part of the SW1/4 and SE1/4, and a tract being part of the SW1/4, all in Section 18, Township 5 North, Range 67 West of the 6th P.M., Weld County, Colorado (the "Property") is zoned for agricultural use and presently contains industrial improvements (the "Industrial Improvements") in violation of the Weld County Land Use Code. The Neighborhood Defendants further affirmatively aver that they have asked the Colorado Court of Appeals to order the removal of the Industrial Improvements consistent with the Weld County Land Use Code by mandatory injunction in Case No. 2018CA1103, which remains pending before the Colorado Court of Appeals. To the extent that any of the allegations in Paragraph 2 depart from the foregoing, the Neighborhood Defendants are without knowledge and deny the same.

3. Paragraph 3 of the Complaint sets forth a number of legal conclusions to which no response is required, and the Neighborhood Defendants therefore deny the same. To the extent that Paragraph 3 asserts factual allegations, the Neighborhood Defendants are without knowledge as to those allegations and therefore deny the same.

4. The Neighborhood Defendants admit the allegations of Paragraph 4 of the Complaint.

5. The Neighborhood Defendants admit the allegations of Paragraph 5 of the Complaint.

6. The Neighborhood Defendants are without knowledge as to the allegations of Paragraph 6 of the Complaint and therefore deny the same.

7. The Neighborhood Defendants admit the allegations of Paragraph 7 of the Complaint.

8. The Neighborhood Defendants admit the allegations of Paragraph 8 of the Complaint.

9. The Neighborhood Defendants admit the allegations of Paragraph 9 of the Complaint.

10. The Neighborhood Defendants admit the allegations of Paragraph 10 of the Complaint.

11. The Neighborhood Defendants admit the allegations of Paragraph 11 of the Complaint.

12. The Neighborhood Defendants admit the allegations of Paragraph 12 of the Complaint.

13. The Neighborhood Defendants admit the allegations of Paragraph 13 of the Complaint.

14. The Neighborhood Defendants admit the allegations of Paragraph 14 of the Complaint.

15. The Neighborhood Defendants are without knowledge as to the allegations of Paragraph 15 of the Complaint and therefore deny the same.

16. Paragraph 16 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

17. Paragraph 17 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

18. Paragraph 18 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

19. Paragraph 19 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

20. Paragraph 20 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

21. Paragraph 21 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

22. Paragraph 22 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

23. Paragraph 23 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

24. The Neighborhood Defendants admit the first sentence of Paragraph 24 of the Complaint. The Neighborhood Defendants are without knowledge as to the allegations in the second sentence of Paragraph 24 of the Complaint and therefore deny the same.

25. The Neighborhood Defendants are without knowledge as to the allegations of Paragraph 25 of the Complaint and therefore deny the same.

26. The first sentence of Paragraph 26 of the Complaint refers to a written document which speaks for itself, and the Neighborhood Defendants deny any characterization that is inconsistent with the same. The second sentence of Paragraph 26 sets forth a legal conclusion to which no response is required, and the Neighborhood Defendants therefore deny the same.

27. Paragraph 27 of the Complaint refers to written documents which speak for themselves, and the Neighborhood Defendants deny any characterization that is inconsistent with the same.

28. The first sentence of Paragraph 28 of the Complaint refers to a written document which speaks for itself, and the Neighborhood Defendants deny any characterization that is inconsistent with the same. As to the second sentence of Paragraph 28 of the Complaint, the Neighborhood Defendants affirmatively aver that Weld County may not take any further action with regards to Martin Marietta Materials, Inc.'s ("Martin Marietta") use by special review application until the state court action has concluded. The Neighborhood Defendants are without knowledge as to the remaining allegations of Paragraph 28 of the Complaint and therefore deny the same.

29. The Neighborhood Defendants deny the allegations of Paragraph 29 of the Complaint.

30. The Neighborhood Defendants restate and reaffirm each of the foregoing paragraphs.

31. Paragraph 31 of the Complaint sets forth legal conclusions to which no responses are required, and the Neighborhood Defendants therefore deny the same.

32. The Neighborhood Defendants admit the allegations set forth in Paragraph 32 of the Complaint.

33. The Neighborhood Defendants are without knowledge as to the allegations set forth in Paragraph 33 of the Complaint and therefore deny the same.

34. The Neighborhood Defendants are without knowledge as to the allegations set forth in Paragraph 34 of the Complaint and therefore deny the same.

35. The Neighborhood Defendants affirmatively aver that part of the relief that they sought in the underlying state court litigation was for the Industrial Improvements to be removed consistent with the zoning of the Property and the Weld County Land Use Code. The Neighborhood Defendants deny any inconsistent allegations set forth in Paragraph 35 of the Complaint.

36. The Neighborhood Defendants are without knowledge as to the allegations of Paragraph 36 of the Complaint and therefore deny the same.

37. The Neighborhood Defendants deny the allegations of Paragraph 37 of the Complaint.

GENERAL DENIAL

The Neighborhood Defendants deny that Rock & Rail is entitled to any of the relief requested in its Complaint. Any allegation, averment, contention or statement in the Complaint not specifically and unequivocally admitted herein is denied.

AFFIRMATIVE DEFENSES

Discovery and investigation may reveal one or more additional defenses available to the Neighborhood Defendants in this matter. The Neighborhood Defendants reserve the right to supplement their defenses.

The Neighborhood Defendants assert the following affirmative and additional defenses to Rock & Rail's Complaint, but do not assume the burden of proof with regards to any such defense, except as required by law.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The claim asserted in the Complaint is not ripe for this Court's consideration.

THIRD DEFENSE

The Complaint fails to raise an actual case or controversy.

FOURTH DEFENSE

The Complaint raises issues that, at least in part, have already been resolved against Rock & Rail's predecessor in interest such that Rock & Rail should be collaterally estopped from re-raising those issues before this Court in light of judicial comity and the doctrine of res judicata.

FIFTH DEFENSE

The relief sought by Rock & Rail is barred by the doctrines of waiver, estoppel, and/or unclean hands in light of the fact that Rock & Rail's parent company and predecessor in interest previously accepted that the Property and the Improvements were subject to state and local land use law and voluntarily agreed to developments conditions governing such interests.

WHEREFORE, the Neighborhood Defendants respectfully requests that this Court:

1. Enter judgment in their favor on Rock & Rail's sole claim;

2. Award the Neighborhood Defendants all reasonable costs, pre- and post-judgment interest, and/or attorneys' fees incurred in the defense of this action, as may be recoverable under any applicable laws; and

3. Grant such other and further relief as is just and appropriate.

DEFENDANTS' COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

For their Counterclaim against Rock & Rail, the Neighborhood Defendants state as follows:

1. The Neighborhood Defendants incorporate herein the admissions, denials, averments, and defenses set forth in the foregoing Answer, as if set forth fully herein.

Nature of the Dispute

2. This dispute is the product of a bait and switch by a party that was soundly defeated in state court. Rather than respect that outcome and the state and municipal laws that otherwise governs land use decisions affecting local communities, Martin Marietta has—without any advance notice to the Neighborhood Defendants or the Colorado state courts—apparently transferred its Industrial Improvements to a subsidiary entity, Rock & Rail, in an attempt to

shroud its now-illegal asphalt and concrete manufacturing facility under an unrelated federal law. To complete this gambit, however, Rock & Rail had to first mislead the Surface Transportation Board as to the circumstances giving rise to the Industrial Improvements and then had to further obfuscate regarding its intended operations at the Property.

3. Now, in a collateral attack on the Neighborhood Defendants' state court lawsuit, which remains ongoing, Rock & Rail asks this Court to bless this sham process and to forever foreclose the ability of the Neighborhood Defendants to obtain a final adjudication in state court. However, a more careful examination of the facts underlying the instant lawsuit confirms that, as a matter of both federal and state law, Rock & Rail is not entitled to operate the Industrial Improvements for at least four separate reasons.

4. First, both Rock & Rail's Complaint in this action as well as Rock & Rail's notice of exemption to the Surface Transportation Board ("STB") ignore the fact that federal preemption under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501, does not extend to non-transportation activities, such as the industrial concrete plant that Rock & Rail now claims that it will operate at the Property in violation of the Weld County Land Use Code.

5. Second, Rock & Rail failed to comply with the National Environmental Policy Act, as required by the STB's regulations for new rail construction proposals. 49 CFR 1105.6.

6. Third, as a consequence of these failures, the exemption that Rock & Rail claims to have received from the STB is based on incomplete, false, and/or misleading information such that this approval is void ab initio and the Weld County Land Use Code has not been preempted by any valid federal authority.

7. Fourth, under controlling federal precedent, Rock & Rail continues to be bound by the development and operation standards voluntarily agreed to by its parent company, Martin Marietta, including but not limited to the voluntary condition that the Industrial Improvements will not exceed Weld County residential noise standards where the Property is adjacent to existing residential uses (including properties that are owned by some of the Neighborhood Defendants). The Colorado Court of Appeals previously held that Martin Marietta has not demonstrated that the Industrial Improvements can meet this noise standard, and consistent with STB precedent regarding federal preemption, this Court can and should prevent Rock & Rail from utilizing any of the Industrial Improvements unless and until it can demonstrate compliance with this and all other voluntarily accepted development and operation standards.

8. Finally, Rock & Rail's commencement of industrial operations at the Property earlier this month is in violation of federal and state law and does so in a manner that directly injures and impairs the rights of the Neighborhood Defendants. The Neighborhood Defendants are entitled to declaratory and injunctive relief ordering Rock & Rail to comply with all applicable laws.

Parties, Jurisdiction, and Venue

9. As confirmed by Rock & Rail's Complaint and the Neighborhood Defendants' Answer, this Court has personal jurisdiction over all of the parties now before it as all of the parties can be said to reside within the state of Colorado for jurisdictional purposes. The Neighborhood Defendants have long opposed the construction and operation of the Industrial Improvements at the Property and each of the property rights of each of the Neighborhood

Defendants will be damaged if Rock & Rail is permitted to operate an industrial facility in close proximity to their homes and businesses without lawful authority to do so.

10. Consistent with Rock & Rail's Complaint and the Neighborhood Defendants' Answer, this Court has subject matter jurisdiction over this dispute seeking an adjudication of Rock & Rail's rights under federal law and the application of state and municipal laws in the face of Rock & Rail's claim of federal preemption.

11. Consistent with Rock & Rail's Complaint and the Neighborhood Defendants' Answer, venue to resolve this dispute before this Court is proper under 28 U.S.C. § 1391(b)(1) and (2) because all of the actions, events, and/or omissions giving rise to this dispute occurred in this judicial district and Rock & Rail is a resident of the state of Colorado.

General Allegations

12. The Neighborhood Defendants reallege and incorporate each of the foregoing allegations as if set forth herein.

13. The present dispute began in 2015, when Martin Marietta applied to Weld County to obtain a use by special review ("USR") permit to convert the Property from its existing agricultural use to a heavy industrial facility.

14. The Property is within the A (Agricultural) Zone and, without a USR, the Property is to be presumptively used for agricultural uses and may not be used for industrial uses under the Weld County Land Use Code.

15. As Proposed to Weld County, the Industrial Improvements include the following:

a. A 110-foot tall batch concrete plant;

b. A 100-foot tall continuous (drum mix) asphalt plant powered by on-site natural gas electric generation;

c. A rail spur and 6,400-foot train loop to accommodate the entire length of 121-car trains (including 4 locomotives) completely stopping onsite to dump—over the course of eight-hour unloading periods—full trainloads of aggregate and/or asphalt cement to the site up to three times per week;

d. A materials processing facility for recycling and sales, which will include on-site crushing, washing, screening, sorting, stockpiling, unloading, and loading of sand, rock, gravel, clay, and topsoil;

e. A 14,400 square foot office building, an electrical substation, and at least fifteen other new buildings and modular trailers;

f. Storage of up to 680,000 cubic yards of construction materials, including sand, rock, gravel, aggregate, cement, and various additives; and

g. Storage of 4.5 million gallons of asphalt cement, 24,000 gallons of emulsified asphalt cement, 40,000 pounds of chemical color additives, 285 tons of cement, 180 tons of coal fly ash, 37,000 gallons of diesel fuel, and 10,000 gallons of propane.

16. The Neighborhood Defendants along with dozens of other concerned citizens and neighboring local governments opposed Martin Marietta's USR application as inconsistent with the Weld County Land Use Code for a plethora of reasons, including but not limited to the fact that the proposed use would be inconsistent with the existing surrounding land uses and the future proposed land uses for the neighborhood and would result in significant negative impacts to public health, safety, and welfare due to increased traffic, industrial noise, pollution, and reduced quality of life and reduced property values for the neighbors surrounding the Property.

17. At the time—and it is still true today—all of the uses in the immediate vicinity of the Property are zoned and used for either agriculture, agricultural related small businesses, or low-density residential land uses.

18. Both the County Land Use Staff and the Weld County Planning Commission recommended the denial of Martin Marietta's USR application due to concerns over incompatibility under the Weld County Code.

19. Nevertheless, Martin Marietta's USR application was approved by the Weld County Board of County Commissioners (the "County Commissioners") on September 15, 2015.

20. As part of this process, Martin Marietta voluntarily agreed that the Property and the Industrial Improvements would be subject to seven conditions of approval and forty-two development standards (the "Development Standards").

21. One of the many Development Standards agreed to by Martin Marietta is that the noise generated by the Industrial Improvements and its operations at the Property would not exceed 55 dB(A) during the day and 50 dB(A) at night all boundaries of the Property that are adjacent to neighboring residential uses.

22. Thereafter, the Neighborhood Defendants retained counsel and timely filed suit in Weld County District Court pursuant to Rule 106 of the Colorado Rules of Civil Procedure to appeal the County Commissioners' approval of Martin Marietta's USR.

23. Among other things, the Neighborhood Defendants' state court lawsuit against the County Commissioners and Martin Marietta (at Weld County District Court Case No. 2015CV030776) asked the Weld County District Court to review the administrative record that was before the County Commissioners to determine whether the County Commissioners had correctly applied the Weld County Land Use Code or whether they had exceeded their authority and abused their discretion.

24. While this action was pending before the Weld County District Court, Martin Marietta sent a letter to Weld County on December 21, 2015, announcing Martin Marietta's intent to proceed with the Industrial Improvements at the Property notwithstanding the Neighborhood Defendants' state court appeal.

25. In this letter, Martin Marietta expressly recognized and accepted the risk that if the Neighborhood Defendants' appeal was successful that Martin Marietta might be required to remove its Industrial Improvements.

26. The Weld County District Court denied the Neighborhood Defendants' state court appeal on January 27, 2017, and entered final judgment in favor of Martin Marietta and Weld County.

27. The Neighborhood Defendants timely appealed the District Court's final judgment to the Colorado Court of Appeals and raised five discrete issues on appeal (in Colorado Court of Appeals Case No. 2017CA463).

28. The Colorado Court of Appeals, however, ruled in favor of the Neighborhood Defendants in an Opinion dated November 22, 2017.

29. Specifically, the Colorado Court of Appeals held that the County Commissioners' abused their discretion in approving Martin Marietta's USR proposal despite the fact that the undisputed evidence submitted by Martin Marietta showed that the proposed use could not comply with the residential noise standard that the County and Martin Marietta had agreed would apply to the USR at those places where the Property bordered neighboring residences.

30. Because the Court of Appeals found that this issue was dispositive of the dispute, the Court of Appeals declined to resolve the four other issues that the Neighborhood Defendants had raised on appeal.

31. The Court of Appeals' Opinion held that the County Commissioners' approval of the Martin Marietta USR was unlawful and directed the Weld County District Court to enter judgment in favor of the Neighborhood Defendants.

32. Because the County Commissioners' approval of the Martin Marietta USR application was found to be unlawful, the Property may only be used for those uses that are permitted by right within the A (Agricultural) Zone under the Weld County Land Use Code.

33. Following the reversal of the approval of the USR application, the Industrial Improvements were rendered unlawful and in violation of the Weld County Land Use Code.

34. Thereafter, the Colorado Court of Appeals denied Martin Marietta's requests for rehearing and re-argument and entered its mandate on April 30, 2018, returning jurisdiction over the state court action to the Weld County District Court.

35. Following additional briefing regarding the meaning of the Court of Appeals' Opinion before the Weld County District Court, the District Court entered final judgment reversing the USR and remanding to the USR application to the County Commissioners.

36. In entering this final judgment, the Weld County District Court also denied the Neighborhood Appellants' request for a mandatory injunction ordering the County Commissioners to enforce the existing zoning at the Property and ordering Martin Marietta to remove the Industrial Improvements.

37. During the briefing on these issues before the Weld County District Court, Martin Marietta confirmed that it completed construction of all of the Industrial Improvements at the Property (including the rail loop, transloading facility, and ready-mix concrete plant) with the exception of the proposed asphalt plant.

38. The Neighborhood Defendants initiated a second appeal before the Colorado Court of Appeals (Case No. 2018CA1103), which asked the appellate court to review the lawfulness of the District Court's final judgment in light of the Court of Appeal's earlier Opinion.

39. The Neighborhood Defendants argued in this second appeal that the Weld County Land Use Code does not allow for a "reversed" USR application to be remanded for further administrative proceedings and that the only lawful final judgment consistent with the Court of Appeals' Opinion was denial of the application, which under the Weld County Land Use Code would then trigger a five-year moratorium on any similar land use applications for the Property.

40. The Neighborhood Defendants further argued that the District Court erred in concluding that it was powerless to grant the Neighborhood Defendants the mandatory injunction that they sought as full and final relief and consistent with Martin Marietta's earlier knowing statement that it could be forced to remove the Industrial Improvements if the County Commissioners' approval of its USR application were subsequently reversed on appeal.

41. Martin Marietta unsuccessfully attempted to have this second appeal dismissed on procedural grounds before the parties could brief the substantive issues on appeal.

42. The Neighborhood Defendants fully briefed the substance of the issues and filed their Opening Brief in the second state court appeal on September 13, 2018.

43. Unbeknownst to the Neighborhood Defendants and while the Neighborhood Defendants were working to prepare their Opening Brief, Martin Marietta was apparently taking secret actions in an effort to moot the Neighborhood Defendants' state court appeal.

44. Specifically, Martin Marietta purportedly assigned all of its interests in the Property, the Industrial Improvements, and any and all contracts, government approvals, or licenses to Rock & Rail via a series of assignment agreements dated August 20, 2018.

45. These purported assignments were apparently made for no material consideration.

46. Rock & Rail has represented that it is part of the Martin Marietta "family of companies."

47. Upon information and belief, Rock & Rail is a wholly owned subsidiary of Martin Marietta.

48. Upon information and belief, Martin Marietta controls Rock & Rail.

49. Because Rock & Rail is allegedly a Class III rail carrier, the STB must approve of any acquisition of additional rail line. 49 U.S.C. § 10902.

50. Pursuant to STB regulations, Rock & Rail filed a Verified Notice of Exemption (the "Rock & Rail Notice") with the STB dated August 20, 2018.

51. At the time that Rock & Rail submitted the Rock & Rail Notice to the STB, none of the Industrial Improvements were operational and they had never been operated at any time in the past.

52. Nevertheless, the Rock & Rail Notice describes the Industrial Improvements as Martin Marietta's "existing industry [sic] facility." (Ex. A, at p. 2.)

53. The Rock & Rail Notice provides that Rock & Rail would obtain the "concrete ready-mix plant" that Martin Marietta constructed at the Property.

54. However, the Rock & Rail Notice does not seek the STB's permission to acquire or operate the concrete plant as part of its federal railroad operations.

55. The Rock & Rail Notice further claims that Rock & Rail's acquisition of Martin Marietta's Industrial Improvements "will not result in significant changes in carrier operations."

56. The Rock & Rail Notice does not explain that Martin Marietta's Industrial Improvements were constructed in accordance with a now-invalid Weld County USR permit.

57. The Rock & Rail Notice does not explain that Martin Marietta's Industrial Improvements were not constructed in accordance with any federal process.

58. The Rock & Rail Notice ignores the fact that under STB regulations, a carrier must comply with the National Environmental Policy Act before it can engage in "rail construction" like the rail portions of the Industrial Improvements.

59. The Neighborhood Defendants were not provided with notice of the Rock & Rail Notice, and therefore could not file an objection to the same before it was taken up by the STB.

60. The STB approved Rock & Rail's exemption on September 5, 2018 (the "Exemption").

61. The Exemption provides that Rock & Rail may acquire and operate the "Rail Lines of Martin Marietta Materials, Inc." without further approval from the STB.

62. The Exemption incorrectly refers to the Industrial Improvements as "Martin Marietta's existing industry facility" and approves Rock & Rail's acquisition of an "existing yard, switching, and industry tracks (the Lines)."

63. The Exemption states that "[a]ccording to [Rock & Rail], this action is categorically excluded from environmental review under 49 C.F.R. § 1105.6(c)."

64. The Exemption notes that Rock & Rail would acquire other facilities from Martin Marietta, including "a concrete ready-mix plant."

65. The Exemption does not, however, approve Rock & Rail's acquisition of the industrial concrete manufacturing facility or otherwise provide that such improvements are under the federal purview of the STB.

66. The Exemption provides that the STB exemption will only be stayed if a petition to revoke the Exemption is filed by September 12, 2018.

67. At this time, the Neighborhood Defendants did not have notice of the Exemption and it does not appear that any party timely filed an appeal of the Exemption such that the Exemption would be automatically stayed by the STB.

68. The Neighborhood Defendants did not learn about the Rock & Rail Notice, the Exemption, and Martin Marietta's purported transfer of its interests in the Property and the Industrial Improvements to Rock & Rail until Martin Marietta and Rock & Rail sent out a joint press release on or around September 25, 2018.

69. The next day, and before the Neighborhood Defendants could determine whether a petition challenging the exemption should be filed before the STB, Rock & Rail filed the instant federal lawsuit against the Neighborhood Defendants on September 26, 2018.

70. Martin Marietta and the County Commissioners have now once again asked the Colorado Court of Appeals to dismiss the Neighborhood Defendants' underlying state court

appeal because, they claim, that action has been mooted by Martin Marietta's conveyance of the Industrial Improvements to its subsidiary, Rock & Rail.

71. Martin Marietta and the County Commissioners have further claimed that Martin Marietta has completely abandoned its USR application.

72. Echoing Rock & Rail in this action, both the County Commissioners and Martin Marietta have further claimed that Colorado state courts are powerless to determine the legality of the Industrial Improvements, including the industrial concrete manufacturing facility that remains in place on the Property in violation of the Weld County Land Use Code.

73. The County Commissioners and Martin Marietta have claimed that Rock & Rail is now operating the Industrial Improvements at the Property.

74. Although the facility had not operated during the pendency of the state court appeal, at least three trainloads of raw aggregate have entered the Property and utilized the Industrial Improvements in recent weeks.

75. Although their responsive pleading is not yet due, the Neighborhood Defendants have indicated that they will oppose the renewed efforts of Martin Marietta and the County Commissioners to dismiss the second state court appeal.

76. Rock & Rail has still made no showing that it can operate the Industrial Improvements consistent with the Development Standards.

77. The Neighborhood Defendants have already been injured as a result of Rock & Rail's operation of the Industrial Improvements, including but not limited to noise, dust, and severe traffic congestion.

78. To the extent that they are not preempted by other law, the Industrial Improvements continue to exist at the Property in violation of the Weld County Land Use Code.

79. Through its own actions and the actions of its predecessor, Rock & Rail has demonstrated that it will stop at nothing to avoid the application of Colorado state law and the land use controls mandated by the Weld County Land Use Code.

80. Rock & Rail has demonstrated that it will not voluntarily remove the Industrial Improvements (which remain illegal under the Weld County Code) and that it intends to operate all of the Industrial Improvements to the direct and immediate injury of the Neighborhood Defendants and the broader community, and notwithstanding any contrary orders from Colorado state courts.

FIRST CLAIM FOR RELIEF
(Declaratory Relief pursuant to Fed. R. Civ. P. 57—Non-Rail Improvements)

81. The Neighborhood Defendants reallege and incorporate each of the foregoing allegations as if set forth herein.

82. The Industrial Improvements remain in place at the Property.

83. The Industrial Improvements are not governed by a valid USR permit and exist in violation of the zoning applicable to the Property under the Weld County Code.

84. The Industrial Improvements include industrial facilities that are intended to support industrial manufacturing activities unrelated to Rock & Rail's purported rail transportation activities.

85. The ICCTA does not preempt state and local land use laws relating "manufacturing activities and facilities not integrally related to the provision of interstate rail

service." *Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380, 1999 WL 71572, at *7 (1999).

86. Similarly, the ICCTA does not preempt state and local land use laws relating to a local government's "police powers to protect public health and safety." *Id.* at *5.

87. The ICCTA does not preempt state and local law with regard to those Industrial Improvements that are unrelated to Rock & Rail's purported rail transportation activities.

88. The STB has never approved or otherwise considered Rock & Rail's operation of the non-rail Industrial Improvements, including but not limited to the industrial concrete manufacturing plant.

89. The actions of Rock & Rail (and its parent and predecessor, Martin Marietta) demonstrate that Rock & Rail has no intention of respecting state and local land use law with regard to any of the Industrial Improvements, including those that have no relationship to its purported rail operations.

90. The Neighborhood Defendants are entitled to an order from this Court that federal law does not preempt state and local law with regard to these non-rail Industrial Improvements, including but not limited to the industrial concrete manufacturing plant.

91. Because Rock & Rail's non-rail Industrial Improvements remain subject to the Weld County Land Use Code and because Rock & Rail (and its parent and predecessor in interest, Martin Marietta) has confirmed that it will abandon Martin Marietta's efforts to obtain a USR, the Neighborhood Defendants are further entitled to an order from this Court that Rock & Rail's non-rail Industrial Improvements are in violation of state and local law.

SECOND CLAIM FOR RELIEF
(Declaratory Relief pursuant to Fed. R. Civ. P. 57—Environmental Review)

92. The Neighborhood Defendants reallege and incorporate each of the foregoing allegations as if set forth herein.

93. The Rock & Rail Notice claimed that Rock & Rail's acquisition of the Industrial Improvements is exempt from the STB regulations implementing the National Environmental Policy Act because the acquisition allegedly amounted to nothing more than a change in operator.

94. This statement in the Rock & Rail Notice was misleading and appears to have been calculated to omit the fact that the Industrial Improvements include new rail construction that was constructed under a since-abandoned local land use process.

95. Rock & Rail's Industrial Improvements are comprised in part of new rail construction that has never been subjected to environmental review under the National Environmental Policy Act and the STB's implementing regulations.

96. To the extent that these rail improvements are only subject to the jurisdiction of the STB, Rock & Rail must be compelled to comply with the provisions of the National Environmental Policy Act relating to new rail construction under the purview of the federal government.

97. Rock & Rail has shown no inclination to comply with the National Environmental Policy Act and instead, misled the STB by claiming that an environmental review is not necessary with respect to this new rail construction.

98. As the neighbors to the Property, the Neighborhood Defendants are directly and acutely affected by the negative effects of the Industrial Improvements, including the new rail construction that was never vetted in accordance with the National Environmental Policy Act.

99. The Neighborhood Defendants are entitled to an order from this Court that to the extent that the newly constructed Industrial Improvements are governed by federal law, Rock & Rail must comply with the National Environmental Policy Act before engaging in any further operations.

THIRD CLAIM FOR RELIEF
(Declaratory Relief pursuant to Fed. R. Civ. P. 57—Void STB Exemption)

100. The Neighborhood Defendants reallege and incorporate each of the foregoing allegations as if set forth herein.

101. The Rock & Rail Notice to the STB included false, incomplete, and misleading information.

102. Consistent with the ICCTA and the STB's regulations the Exemption now possessed by Rock & Rail should now be declared void.

103. Rock & Rail has maintained that the Exemption is valid and that it can continue to operate all of the Industrial Improvements (including the industrial concrete manufacturing facility that is not covered by the Exemption) without regard to state or local law.

104. As the neighbors to the Property, the Neighborhood Defendants are directly and acutely affected by the negative effects of the Industrial Improvements, which Rock & Rail intends to operate under an invalid Exemption that has never been fully considered by the STB as required under the ICCTA.

105. The Neighborhood Defendants are entitled to an order from this Court that the Exemption is void ab initio and that all further rail operations at the Property must cease.

FOURTH CLAIM FOR RELIEF
(Declaratory Relief pursuant to Fed. R. Civ. P. 57—Development Standards)

106. The Neighborhood Defendants reallege and incorporate each of the foregoing allegations as if set forth herein.

107. The Industrial Improvements were constructed at the Property consistent with the USR.

108. Under the USR, Rock & Rail's parent company and predecessor in interest voluntarily agreed to be bound by the Development Standards, including but not limited to the residential noise standard.

109. These voluntarily accepted Development Standards continue to govern any industrial use at the Property irrespective of any claim of federal preemption. *The Township of Woodbridge, NJ v. Consolidated Rail Corporation, Inc.*, 5 S.T.B. 488, 2001 WL 283507, at *2 (2001).

110. The Colorado Court of Appeals has held that Rock & Rail's predecessor failed to demonstrate that the operation of the Industrial Improvements could comply with the residential noise standard that Martin Marietta voluntarily accepted as part of the approval for construction.

111. Rock & Rail has taken the position that it is not bound by the Development Standards.

112. As the neighbors to the Property, the Neighborhood Defendants are directly and acutely affected by the negative effects of the Industrial Improvements, which Rock & Rail now claims that it can operate without regard to the Development Standards.

113. The Neighborhood Defendants are entitled to an order from this Court that the Development Standards that were voluntarily agreed to by Martin Marietta continue to apply with equal force to Rock & Rail's operation of the Industrial Improvements, including but not limited to the residential noise standard.

PRAYER FOR RELIEF

WHEREFORE, the Neighborhood Defendants request that the following judgments and orders be entered against Rock & Rail:

A. Declaratory judgment that Rock & Rail's non-rail Industrial Improvements, including the industrial concrete manufacturing plant, are not exempt from state and local law and are in fact illegal under the Weld County Land Use Code and applicable zoning;

B. Declaratory judgment that the Rock & Rail Industrial Improvements that are subject to federal jurisdiction must undergo environmental review as new rail construction consistent with the National Environmental Policy Act;

C. Declaratory judgment that Rock & Rail's Exemption is void ab initio because it contained false and/or misleading information;

D. Declaratory judgment that Rock & Rail's operation of the Industrial Improvements is subject to the Developmental Standards that were voluntarily agreed to by Rock & Rail's parent company and predecessor in interest;

E. An order entering preliminary injunctive relief against Rock & Rail enjoining the operation of the Industrial Improvements;

F. An order entering permanent injunctive relief against Rock & Rail enjoining the operation of those Industrial Improvements that violate applicable law;

G. An order entering mandatory injunctive relief against Rock & Rail ordering Rock & Rail to remove those Industrial Improvements that violate applicable law; and

H. Such other additional relief as may be provided by law or as the Court may otherwise deem just and proper.

JURY DEMAND

The Neighborhood Defendants request a trial by jury with respect to all claims, counterclaims, and defenses so triable.

Dated this 18th day of October 2018.

s/ Mark E. Lacis
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Attorneys for the Neighborhood Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I electronically filed the foregoing **DEFENDANTS' ANSWER AND COUNTERCLAIM FOR DECLARATORY RELIEF** with the Clerk of the Court using the CM/ECF system and served the following counsel through the CM/ECF system:

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s/ Mark E. Lacis
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