

**Matter of Metro-North Train Acc. of Feb. 3, 2015 in
the Town of Mount Pleasant, N.Y.**

2018 NY Slip Op 34606(U)

February 16, 2018

Supreme Court, Westchester County

Docket Number: Index No. 64924/2015

Judge: Joan B. Lefkowitz

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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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IN RE METRO-NORTH TRAIN ACCIDENT OF
FEBRUARY 3, 2015 IN THE TOWN OF MOUNT
PLEASANT, NEW YORK

DECISION & ORDER

Index No.: 64924/2015
Seq#21

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order pursuant to CPLR 3126 striking defendants' answer, precluding defendants from defending liability, or alternatively compelling defendants to provide discovery:

Plaintiffs' Order to Show Cause - Affirmation in Support - Exhibits A-S
Town of Mount Pleasant's Affirmation in Opposition - Exhibits A-J
Metro-North Defendants' Affirmation in Opposition - Exhibits A-H
Plaintiffs' Supplemental Affirmation

Upon the foregoing papers and oral argument heard on November 6, 2017, this motion is determined as follows:

Background

This consolidated action¹ concerns wrongful death actions and personal injury actions arising from a February 3, 2015 collision between a northbound Metro-North commuter train and a car in the Commerce Street Highway - Rail Grade Crossing (U.S. DOT Grade Crossing No. 529902V; hereinafter, the "crossing"), in the Town of Mount Pleasant, Hamlet of Valhalla, New York. Plaintiffs include passengers on the train, the Estate of Ellen Brody ("Brody") who operated the car, and Steven Smalls, the train conductor. After the train collided with the car, the third rail of the tracks pierced through the car and the train, and the train caught fire. Five passengers and Brody died in the accident and numerous other passengers were injured.

¹By amended stipulation and order, entered on July 25, 2016, nineteen actions were consolidated for discovery on liability, liability motion practice, and joint trial as to liability only (NYSCEF Doc #41).

Plaintiffs commenced actions against Metro-North Railroad and Metropolitan Transportation Authority (collectively, "Metro-North") as the railroad operators, and Argent Ventures LLC and Midtown TDR Ventures LLC (collectively, "Argent") as owners of the track and the land under the track (the Metro-North and Argent defendants are collectively referred to as "the Metro-North defendants"). Plaintiffs also named the Town of Mount Pleasant (the "Town") as defendant.²

The National Transportation Safety Board ("NTSB") conducted an investigation into the accident. On or about July 26, 2017, the NTSB released a synopsis of its findings and, on September 5, 2017, the NTSB issued a final report (the "NTSB Report").³

Plaintiffs allege that the Metro-North defendants and the Town were negligent. More specifically, plaintiffs allege, inter alia, that the angle of the tracks, a lack of lighting, a curve in the tracks, and a utility building located adjacent to the tracks created a visibility issue for Brody and the train conductor; that the signs, warnings, and pavement markings on Commerce Street were inadequate at the intersection and the stop bar for traffic was obscured; that the gates were not working properly; that the Metro-North defendants failed to make necessary repairs; that the train did not have a "cow catcher" on the front of the train to deflect a vehicle off of the tracks in the event of an accident; and that the design of the crossing and entrance to the Taconic Parkway was dangerous. Plaintiffs further allege that the design of the third rail at the crossing was unsafe.

Defendants dispute plaintiffs' allegations. In their opposition papers, the Metro-North defendants rely on certain findings contained in the NTSB Report. They assert, inter alia, that the NTSB found that the crossing was equipped with passive and active warning devices, including cross-bucks, flashing lights, and automatic gates, which were in good working condition and in compliance with federal regulations; that there were adequate signs including a sign that read, "RR," positioned 150 feet from the nearest rail and a sign that read, "Do Not Stop On Tracks," situated 65 feet from the nearest rail. The Metro-North defendants argue that the NTSB also found that Brody, for undetermined reasons, did not comply with the advance warning system at the crossing, stopped past the stop line within the boundary of the grade crossing and drove on to the tracks. They further contend that although the train engineer activated the emergency brakes, the train could not avoid collision with the car.

The Metro-North defendants state that the NTSB ruled out the following as factors that may have contributed to the collision: the mechanical condition of the train or car; the engineer's

²Metro-North commenced a third-party action against the Estate of Ellen Brody in March 2016; thereafter, the Town commenced a second third-party action against the Estate.

³The Final Report and documents related to the investigation are accessible online on the NTSB's public docket; see also Exhibits "A" and "B" to Defendants' Affirmation in Opposition (NYSCEF #131-132).

job performance or fatigue; environmental factors and weather; the condition of the track or the railroad signal system; cell phone use while operating the train or car; or use of alcohol or other drugs by the engineer. The Metro-North defendants state that the NTSB found that the highway-railroad grade crossing warning system at Commerce Street functioned as designed when the accident occurred and met federal and state requirements. Moreover, they refer to the NTSB's findings that the power controller commands de-energized the electrical power to substations in a timely manner and completed the emergency power shutdown, and therefore, electrical power did not cause or contribute to injuries to the emergency responders or the train passengers. The Town echos the Metro-North defendants' denial of any liability for the accident and similarly disputes plaintiffs' allegations.

Discovery Proceedings

Pursuant to a stipulation of the parties, plaintiffs established a Steering Committee to take the lead in discovery proceedings.⁴ The Steering Committee served discovery demands on June 22, 2016, consisting of 111 separate demands for documents. Pursuant to a Compliance Conference Referee Report & Order entered on July 20, 2016, the Metro-North defendants and the Town were directed to serve responses to plaintiffs' discovery demands on or before August 31, 2016. In or about this time, the Metro-North defendants and the Town advised plaintiffs that they were prohibited from disclosing information until the NTSB issued a final report since the NTSB deemed such documents to fall within its investigative privilege. On August 19, 2016, the NTSB issued a letter addressing plaintiffs' discovery demands and advising the Metro-North defendants and the Town which materials could be disclosed during the NTSB investigation.⁵

On September 13, 2016, the Metro-North defendants served a response to plaintiffs' demands. The Metro-North defendants then served a Supplemental Response on October 24, 2016 and a Second Supplemental Response on February 1, 2017. The Town served its discovery responses on October 24, 2016. Thereafter, on June 28, 2017, a Compliance Conference was conducted and a Referee Report & Order was entered (Lefkowitz, J.) requiring that the "defendants shall, on or before August 14, 2017, supplement all prior responses to plaintiffs' demands; to the extent any privilege is asserted, defendants shall provide a detailed privilege log." On August 14, 2017, the Metro-North defendants served a Third Supplemental Response. On August 15, 2017, the Town served a supplemental response. At a Compliance Conference held on September 12, 2017, a briefing schedule was issued for this motion in so far as plaintiffs asserted that defendants had still not fully complied with their discovery demands and the Court's prior orders notwithstanding the issuance of the NTSB's Final Report. On October 26, 2017, the Metro-North defendants submitted written opposition to the motion, and at the same time, served a "Fourth Supplemental Response" to plaintiffs' discovery demands. On October 26, 2017, the Town submitted written opposition to the motion. At oral argument on November 6,

⁴See NYSCEF doc#48.

⁵ See Exhibit "C" to defendants' opposition; NYSCEF doc#133.

2017, plaintiffs advised the Court that discovery remained outstanding and, pursuant to the Court's directive, on November 13, 2017, filed a Supplemental Affirmation setting forth the specific discovery demands made by plaintiffs which they contend remain outstanding to date.

Analysis

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

As recently articulated by the Court of Appeals, "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence" (*Forman v Henkin*, 2018 WL828101 [2018]).

On a CPLR 3126 motion to sanction a party for the failure to provide discovery, "the nature and degree of the penalty ... is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

With these general principles in mind, the Court turns to plaintiffs' motion. Generally, plaintiffs assert that the Metro-North defendants and the Town have failed to timely or completely respond to their discovery demands and have impermissibly withheld material and relevant information. In opposition to this motion, the Metro-North defendants complain, inter alia, that plaintiffs demands seek unlimited disclosure of material "spanning back more than 30

years at the time of the creation of Metro-North,” that the demands are “more suitable to an interrogatory or a deposition,” constitute an impermissible fishing expedition and are otherwise overly broad and improper. The Metro-North defendants state that they have made voluminous disclosures and were prohibited from releasing materials prior to the issuance of the NTSB report, and accordingly, their delay cannot be deemed willful, contumacious or in bad faith. The Metro-North defendants rely on the NTSB’s findings and claim that prior accidents are not relevant or discoverable. They also contend in boilerplate fashion that certain documents are “not subject to discovery or otherwise admissible pursuant to 23 USCA 409, 49 USC 20903, 49 USC 20907, 49 USCA 20703 and 23 USCA 152.” Further, the Metro-North defendants argue that certain documents are privileged or require a confidentiality stipulation before they may be released.

The Town argues that the Town has fully complied with plaintiffs’ demands, that they possess no additional documents or information, other than those documents set forth on a privilege log which is attached to their opposition papers, and that any reports or studies conducted after the accident are post-accident remedial measures and are not discoverable.

In large part, this Court does not credit defendants’ excuses. With respect to the Metro-North defendants, while they argue that they have acted in good faith, too many of their responses to the demands at issue herein have been non-responsive, insufficient and improper. For example, on numerous occasions, the Metro-North defendants refer plaintiffs to the NTSB docket, rather than identify documents responsive to a particular demand. Moreover, it was only after plaintiffs filed the instant motion that the Metro-North defendants served a Fourth Supplemental Response.⁶ Notably, the Metro-North defendants’ opposition papers do not explain why, with respect to information and documents they have agreed to produce or was not subject to the NTSB privilege or any other privilege, they have produced same in piecemeal fashion. For example, although the August 2016 NTSB letter demonstrates that the NTSB authorized defendants to release documents not subject to the assertion of the investigative privilege, the Metro-North defendants have not provided all of these documents, such as the documents responsive to plaintiffs’ demands 68, 69, 71, 79, 80, and 85 through 92. Moreover, although the Metro-North defendants’ Fourth Supplemental Response indicates that they are still searching for documents, they have provided no information as to why, over a year later, they have not been able to produce the relevant discovery.

The Court also notes that with respect to the Metro-North defendants’ assertion that a confidentiality stipulation is required before release of certain documents, pursuant to CPLR 3103(a), “[t]he court may at any time on its own initiative, or on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device,” including confidentiality orders (*Finch, Pruyn & Co. v Niagara Paper Co.*, 228 AD2d 834 [3d

⁶The Metro-North defendants claim that “with the clarification provided by PSC’s [plaintiffs’] current motion” they were able to serve their Fourth Supplemental Response, yet they fail to demonstrate in what respects plaintiffs’ demands required “clarification.”

Dept 1996)). A confidentiality order may be issued where a party establishes that there is a legitimate concern for exposure of trade secrets (*Camenos v F.W. Woolworth Corp.*, 233 AD2d 212 [1st Dept 1996]). A trade secret is defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Management v Janien*, 82 NY2d 395, 604 NYS2d 912 [1993], citing Restatement of Torts §757, comment b; *Mann v Cooper Tire Co.*, 33 AD3d 24 [1st Dept 2006], *lv denied* 7 NY3d 718, *rearg denied* 8 NY3d 956 [2007]). In deciding a trade secret claim, several factors should be considered, including but not limited to: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (*Ashland Management v Janien*, 82 NY2d 395, citing Restatement of Torts §747, comment b).

In New York there is a strong presumption favoring public legal proceedings and openness and the burden is on the party seeking to establish otherwise, with the court having to balance the interests of the parties with the interests of the public (*see eg, Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499 [2d Dept 2007]). Here, the Metro-North defendants have not met this burden and their bare and conclusory assertion that a confidentiality agreement is required does not constitute sufficient cause to condition their production of documents upon the execution of any such agreement.

Likewise, the defendants have not met their burden in demonstrating that certain documents are protected by the attorney client privilege. The attorney client privilege, codified in CPLR 4503(a), "fosters the open dialogue between lawyer and client that is deemed essential to effective representation" (*Spectrum SYS. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). Since the attorney client privilege acts as an "obstacle" to the truth finding process (*see Matter of Priest v Hennessy*, 51 NY2d 62, 68 [1980]), the privilege afforded is to be narrowly construed and "its application must be consistent with the purposes underlying the immunity" (*Spectrum SYS. Intl. Corp. v Chemical Bank*, 78 NY2d at 377). Although the scope of the privilege is to be determined on an individual case basis, certain general principles apply (*see Matter of Priest v Hennessy*, 51 NY2d at 68). Specifically, "[t]he privilege belongs to the client" (*People v Osorio*, 75 NY2d 80, 84 [1989]), and attaches if information is disclosed in confidence to the attorney "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Spectrum SYS. Intl. Corp. v Chemical Bank*, 78 NY2d at 378). "The burden of proving each element of the privilege rests upon the party asserting it" (*People v Osorio*, 75 NY2d at 84). Confidential communications made between an attorney and a client during the course of professional employment are generally privileged unless waived (CPLR 4503(a)). The protection must be narrowly construed (*Willis v Willis*, 79 AD3d 1029 [2d Dept 2010]). Courts have held that the attorney-client privilege is waived when "the client places the subject matter of the [privileged] communication in issue or where the invasion of the

privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information" (*IMO Indus. v Anderson Kill & Olick, P.C.*, 192 Misc2d 605, 609 [Sup Ct, New York County 2002]; see also *Orco Bank, N.V. v Proteinase Del Pacifico*, 179 AD2d 390 [1st Dept 1992]; *Jabkobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834 [2d Dept 1983]; see also *Bolton v Weil, Gotshal & Manges LLP*, 4 Misc3d 1029(A) [Sup Ct, New York County 2004]).

"[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit" (*Deutsche Bank Trust Co. of Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 64 [1st Dept 2007]). Rather, the "at issue" waiver occurs when a party has asserted a claim or defense that he or she intends to prove by use of the privileged material (*id.*), or where rather than being merely relevant, the privileged communications are indispensable to a party's claims or defenses (see *Carl v Cohen*, 23 Misc3d 1110(A) [Sup Ct, New York County 2009]). A waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the client's claim or defense and the application of the privilege would deprive the adversary of vital information (*Soussi v Lazer, Aptheker, Rosella & Yedid, P.C.*, 91 AD3d 753 [2d Dept 2012]).

In the instant matter, the Metro-North defendants have not produced a privilege log to this Court for review or submitted any further information so that a finding on this record can be made as to the documents they claim are privileged. Similarly, although the Town has produced a privilege log, it has failed to demonstrate that the NTSB investigative privilege cited as the basis for withholding discovery in the log, survives the issuance of the NTSB report. Generally, there exists a "common law privilege which exempts information from discovery if disclosure would interfere with law enforcement proceedings, or would compromise the privacy and confidentiality of persons who provide information to law enforcement agencies" (*Department of Investigation of the City of New York v Myerson*, 856 F2d 481, 483–484 [2d Cir1988]). "The purpose of [the law enforcement] privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation (*id.* at 484). "When the government invokes the law enforcement privilege, the court must balance the public interest in nondisclosure against the need of the particular litigant for access to the privileged information" (*Raphael v Aetna Casualty & Surety Co.*, 744 FSupp. 71, 74–75 [SDNY1990]). The party asserting the privilege must "make a threshold showing that the privilege attaches" before the court is required to balance the parties' interests (*United States v United States Currency in the Sum of Twenty One Thousand Nine Hundred Dollars*, No. 98 CV 6168, 1999 WL 993721, at 3 [EDNY1999]).

Here, the NTSB's regulations specifically prohibit parties to an investigation from releasing any information concerning an accident "...to any person not a party representative to

the investigation (including non-party representative employees of the party organization) before initial release by the Safety Board without prior authorization and approval..." (49 CFR 831.13(b)). However, other than the citation to the NTSB privilege in its privilege log, the Town has not demonstrated, much less alleged, that the NTSB privilege has continued after the release of the final report. Indeed, the defendants have not provided any statutory or case law authority which supports the conclusion that the plain language of the federal statute should be distorted to reach such a result.

Moreover, this Court does not agree with the Metro-North defendants' assertion that records of prior accidents are exempt from disclosure under the circumstances of this action. Records of prior similar accidents may be discoverable in a negligence case, as they are relevant to establish that a particular condition was dangerous and that defendant had notice of that condition (*Coan v Long Island R.R.*, 246 AD2d 569 [2d Dept 1998]; *Allstadt v Long Island Home*, 210 AD2d 365 [2d Dept 1994]; *Klatz v Armor Elevator Co.*, 93 AD2d 633 [2d Dept 1983]).

Additionally, while this Court has considered defendants' arguments that subsequent studies should not be discoverable, the Court will allow discovery of post-accident documents, subject to objection to the admissibility of same at trial. While the Metro-North defendants argue that post-accident measures are inadmissible to prove an admission of negligence (*see Stolorski v 234 E. 178th St. LLC*, 89 AD3d 549 [1st Dept 2011]), evidence of subsequent remedial measures may be discoverable or admissible in a negligence case where, as here, there is an issue of maintenance or control (*Graham v Kone, Inc.*, 130 AD3d 779 [2d Dept 2015]; *Del Vecchio v Danielle Assoc., LLC*, 94 AD3d 941 [2d Dept 2012]; *Klatz v Armor Elevator Co.*, 93 AD2d 633 [2d Dept 1983]).

Last, the defendants' contrived suggestion that the NTSB's findings are conclusive as to the cause of the accident and thus have some bearing on their duty to provide discovery at this late date is without merit. Once released, the NTSB's conclusions and findings may not be admissible at trial pursuant to the Independent Safety Board Act of 1974 (49 USC 1154(b)) which states:

"Reports.- No part of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report."

"Courts have consistently held that 'the factual portions of a NTSB report are admissible into evidence, while excluding any agency conclusions on the probable cause of the accident'" (*Major v CSX Transp.*, 278 F Supp 2d 597, 603-604 [D. Md 2003] quoting *Hurd v United States*, 134 F. Supp2d 745, 750 [DSC 2001], *aff'd* 34 Fed. Appx. 77 [4th Cir 2002] and citing *Travelers Ins. Co v Riggs*, 671 F2d 810 [4th Cir 1982]; see also *Dowe v National Railroad Passenger Corp.*, US District Court, ND Illinois, 2004WL 887410, Eastern Division [2004]; *Barna v United States*, 183 FRD 235, 237 [ND Ill.1998]). Therefore, the NTSB's opinion is not dispositive as to discovery which defendants should be compelled to produce.

The Court has granted lengthy extensions for the Metro-North defendants and the Town to respond to plaintiffs' demands and comply with Court orders in light of the NTSB's delay in releasing its final report and in an effort to streamline the discovery process in this complex matter. However, the Metro-North defendants and the Town have ignored Court orders and delayed production of documents to the prejudice of plaintiffs. Moreover, their failure to timely and sufficiently provide discovery has resulted in numerous conferences and motion practice and a waste of judicial resources to parse through plaintiffs' demands and the defendants' responses. Consequently, the Metro-North defendants and the Town will be given one final opportunity to supplement their responses as more specifically discussed herein and comply with the Court's orders before any sanction will issue. However, the Court cautions defendants that any further delay or gamesmanship will not be countenanced.

Analysis of plaintiffs' specific demands

Plaintiffs assert that of their 111 separate demands, the following demands are at issue: 1, 5, 8, 9, 10, 13, 16, 19, 20-23, 25-27, 32-35, 37, 60-61, 68-69, 71, 75, 79-81, 85-96 and 102-106.⁷

Witnesses, photographs, videos, reports, interviews, studies

As to Demands #1, 9, 10, 13, 75, 102-106, plaintiffs seek witness statements, photographs, videos, recordings and interviews. Demand #1 seeks "copies of all documents, videos, photographs, reports, studies, interviews, witness statements, and all other materials regarding any investigation of the accident that is the subject of this litigation performed by any of the defendants." Demand #9 seeks "copies of any photographs, videos or other images taken from within any of the rail cars for MNR passenger train number 659 on the date of the accident or taken at any time thereafter, including, but not limited to, any photographs in defendants' possession that may have been taken by police personnel, investigators, the FRA, NTSC, NYPTSB, NYSDOT or any other entities." Demand #10 seeks "copies of any images (moving or still) recorded or taken by any devices located or installed inside the passenger compartments, train cars, operator's car, conductor's cab, or engineer's cab, or any other recording devices located inside or outside the train." In their demand #13, plaintiffs seek "copies of all audio records from the MTA police department operations and communications dispatch center regarding the accident that is the subject of this litigation."

Demand #75 seeks, "any records, reports, documents, photos, videos, or information or materials prepared by any members, employees, inspectors or other personnel of the MTA police department regarding, concerning or in reference to the accident that is the subject of this

⁷Plaintiffs' counsel also asserts on page 3 of the Supplemental Affirmation that defendants have not provided responses to their demand #150, however, the demands at issue contain only 111 distinct demands. Therefore, this Court has not addressed the contentions that a response to demand #150 remains outstanding.

litigation.” Demand #102 seeks, “copies of any interviews, hearings, or statements taken of Stephen Smalls regarding the accident that is the subject of this litigation.”

Demand #103 seeks “copies of all cellular phone records for Stephen Smalls from February 3, 2015 up to and including February 5, 2015.” Demand #104 seeks “copies of any interviews, hearings or statements taken of all other crew members aboard MNR passenger train 659 on the date of the accident.” Demand #105 seeks the “complete list of the names, addresses and telephone numbers for all witnesses the defendants believe have firsthand knowledge of any acts or omissions alleged in the Plaintiffs’ complaints. If no such witnesses are known, provide a verified statement in response to this demand.” Demand #106 seeks, “copies of any interviews, hearings or statements taken of any witnesses to the accident that is the subject of this litigation.”

Plaintiffs claim that defendants have failed to completely comply with these demands. Specifically, plaintiffs argue that defendants have failed to provide the transcript of the interview of Steven Smalls; digital photographs taken of the accident scene by witness Michael McGuinn provided to Metro-North Police; the name, address, statements, memo book, photographs taken by the undisclosed “Metro-North Chief Investigator/Metro-North Chief” and “Metro-North Sergeant” who were in charge of investigating the accident; the address of William Marshall and Mr. Marshall’s video; the full name and address and email address of Mr. Handler; the full name and address of Ms. Albin and Mike Valenzano; the unredacted copy of the Chief Rail Traffic Controller’s Log; the unredacted Incident History Detailed Report; the Power Director’s transcript of the NTSB interview; the “line of site distances and additional photographs” obtained by Detective Sean Connolly on a Metro-North “test train” to determine the line of sight of Steven Smalls; the Westchester County Police Accident Investigation Unit and Police Department Crime Scene Unit photographs from the accident scene, diagrams of accident scene, and accident scene measurements taken by Westchester Police through its Total Stations equipment provided to Metro-North.

In regard to transcripts, plaintiffs argue that the train conductor, Smalls, and the Power Director, were interviewed by the NTSB during its investigation and that Metro-North participated in these interviews. Plaintiffs state that they discovered that the interviews were being transcribed by a Court reporter when plaintiffs received a partial and incomplete copy of Smalls’ transcript from an outside source. Plaintiffs point out that the Metro-North defendants did not list Small’s transcript or the Power Director’s transcript in response to their demands, or any other employee transcript in its privilege log, and did not disclose the existence of or provide the transcripts. Moreover, plaintiffs state that the Metro-North defendants have failed to disclose the name of the Power Director or any other employee that was interviewed by the NTSB and whose interview was transcribed, or the names of the Metro-North “Chief” Investigator, the Metro-North Police Sergeant who investigated the scene, or any other eye witnesses, notice witnesses, liability witnesses, or defense witnesses. With respect to demand#13, they complain that although the Metro-North defendants have responded that “MTAPD RTC Recordings (individual list of recordings at Bate Stamp # 1797 which will be served on disc under separate cover),” no disc has been provided. They state that the Metro-North defendants have provided

recordings on Drop Box but not on a separate disc so it is unclear whether these recordings are the same.⁸

Plaintiffs also complain that the Town has withheld as purportedly privileged a “draft” of page 6 of the Highway Factors & Railroad Grade Crossing Group Factual Report” drafted by the Town in August 2015. Moreover, plaintiffs contend that the Town has improperly asserted a privilege, as set forth on its privilege log, to six “draft” pages to the NTSB reports including the Highway Factors Report, Survival Factors Highway Group Chairman Report, draft of Town Engineering Department Highway Rail Grade Crossing Elimination & Hazard Assessment Report, draft of HWY15MJ1005 Synopsis. Plaintiffs argue that the Town’s assertion that the Highway Factors & Railroad Grade Crossing Group Chairman’s Factual Report with comments by David Smyth and Draft Engineering Department Highway Rail Grade Crossing Elimination & Hazard Assessment Report were prepared as a subsequent remedial measure is inconsistent with its position that the Town did not have responsibility for the crossing. Plaintiffs note that there have been no documents provided that limit the Town’s duties with respect to the roadway at the subject intersection. Plaintiffs argue that the documents referenced in the Town’s privilege log are relevant to demonstrate the extent of the Town’s responsibility in regard to the crossing and the feasibility of any repairs or elimination of dangerous conditions. Plaintiffs also argue that the Town has impermissibly failed to provide the name and address of Town personnel from its “engineering department” or “superintendent of highways” who were involved in preparing the draft documents.

Plaintiffs allege that the photographs constitute critical evidence since after the accident, the train was removed to a Metro-North yard for preservation and the NTSB investigation. They allege that it is unknown at this time what Metro-North did with the third-rails and whether portions of the rail remain inside the train. Plaintiffs state that they have been unable to inspect the train and its contents due to the NTSB investigation. Plaintiffs also assert that they were unable to inspect and photograph the train and rails at the time of the accident. Plaintiffs claim that the Metro-North defendants may be withholding photographs and videos and have not indicated whether Metro-North took any video footage from inside or outside the train either before or after the accident.⁹

⁸ With regard to demand #104, the Metro-North defendants state that they have provided all audio logs obtained as part of the MTA Police Department Investigation file which includes the emergency calls to the rail traffic controller but that they will, “attempt to determine, if possible which, if any, of the audio logs contain a call of the engineer.”

⁹ The Metro-North defendants argue in opposition that they provided photographs in their possession as part of the MTA PD Investigation file, including MTA PD Investigation Aerial Photos, Accident Scene Photos, Investigation File Post Accident Photos, SUV Interior Photos, and Witness Photos. However, they do not dispute that such production is incomplete, stating that, “although photos from other agencies are equally available to the plaintiff, Defendant is conducting a search for additional responsive photos and videos, to the extent that they exist.”

Notably, the Metro-North defendants' Fourth Supplemental Response states that the Metro-North will produce additional materials.¹⁰ With regard to photographs, the Metro-North defendants' response stated that, "defendants are searching for any additional responsive photographs that may have been taken by the NTSB which may have been provided to Metro-North and are different from the photos provided on the NTSB's public docket. At this time, the defendants are unaware of any photographs that were taken by the FRA, NYSDOT, or the PTSB, but will provide the same to the extent that they are in the possession of the defendants." Further, in opposition to the motion, the Metro-North defendants state that the New York State Department of Motor Vehicles Police Accident Report referenced by plaintiffs is not a report that was generated by the MTA or Metro-North or redacted by it and that it previously produced the MTA PD Property, Statements, Vehicle Inventory & Tow, the MTA PD Accident Statements & Diagrams, MTA PD Incident Report and Supplements, MTA PD Investigation File and the Westchester DES CAD Logs. The Metro-North defendants note that they produced a significant number of MTA PD and MNR Rail Traffic Control audio recordings, the audio recordings of a number of responding agencies, and photographs taken or obtained by the MTA Police Department in connection with the accident occurrence. The Metro-North defendants state that they have provided the statements in its possession that were obtained by the MTA Police Department including those of the train crew and the engineer operating the train on the date of the accident, non-party witnesses and several plaintiffs. However, the Metro-North defendants concede that the MTA PD statements and inventory information was redacted so that certain personal information, such as driver's license information, personal signatures, dates of birth and home addresses were not disclosed by the parties during the course of litigation. Moreover, counsel for the Metro-North defendants states that he agreed to produce unredacted copies of the nonparty witness volunteer statements and that such has been produced as part of the Metro-North defendants' Fourth Supplemental Response.

However, the Metro-North defendants claim that plaintiffs' have improperly demanded "documents and records that were in fact created and/or controlled by the NTSB as part of the NTSB investigation" and thus, they have no obligation to provide same. Specifically, they state that they are "presently not in the possession" of the transcripts or recordings of the interviews conducted by the NTSB. While not provided earlier, they state that in response to the motion, they have identified the "Metro-North Chief Investigator" as Joseph Streeny of the Metro-North Safety Department and that the photos referenced in Mr. Streeny's NTSB interview have been disclosed as part of their Fourth Supplemental Disclosure. They further state that

¹⁰In their Fourth Supplemental Response, the Metro-North defendants stated that, "defendants further note that the final MTA PD Incident Report relating to this accident will also be produced upon its receipt" and that defendants "are in the process of obtaining a complete copy of the final MTA Incident Report concerning this incident and its investigation which will be provided to the plaintiffs upon its receipt." Although it appears from plaintiffs' Supplemental Affirmation that the Incident Report was provided in October 2017, there is no explanation in the Metro-North defendants' opposition papers as why the Metro-North defendants were not able to produce their own Incident Report earlier.

“Defendants are attempting to determine whether additional photographs exists [sic] and if the photos within the witness folders are those of Michael McGuinn and will further supplement their response upon this additional information from the MTA Police Department.” The Metro-North defendants argue that plaintiffs seek unredacted copies of documents that were redacted by the NTSB and not the defendants and that plaintiffs should seek the documentation from the NTSB.

While the Metro-North defendants claim that plaintiffs’ demands are “palpably improper and unduly burdensome,” this Court finds the Metro-North defendants’ responses to be evasive and inappropriate. For example, the Metro-North defendants claim that they did not participate in the passenger interviews conducted by the NTSB, however, it is clear that there was a Metro-North safety officer noted in at least one of the telephone conference interviews. Further, while the Metro-North defendants state that they will identify the Metro-North Safety Officer(s) referenced in the interviews and “any additional identifying information of these passengers to the extent that it exists,” the Metro-North defendants provide no explanation for their delay in doing so or their failure, even in response to this motion, to identify one of their own employees.

Moreover, while the Metro-North defendants maintain that certain redactions to documents, such as the MNR Rail Traffic Controller Log were proper to prevent disclosure of irrelevant information, the Metro-North defendants have not provided a log or any detail with respect to the redactions, or copies of the documents redacted or unredacted in camera to the Court so that this Court may properly review their assertions. Indeed, the Metro-North defendants have attached no documents as exhibits to their opposition motion papers. While it appears that the parties have been utilizing a “dropbox account” or another program to exchange documents, this Court has no access to the dropbox account and the program is not part of the official record before this Court.

Further, the Metro-North defendants argument that they somehow have no obligation to produce documents “created and/or controlled” by the NTSB is specious and without merit. Whether the NTSB created or controlled documents does not excuse their obligation to provide plaintiffs with same if they are in possession of such documents. Metro-North defendants’ boilerplate referral to the NTSB docket without specific reference to responsive documents is improper and non-responsive.

With respect to the Town’s responses, in so far as the NTSB investigative privilege no longer applies, the Town’s assertion of privilege on this basis is without merit. Further, as set forth infra, this Court has considered the Town’s objection to providing disclosure on the grounds that such documents may reveal remedial measures and has determined that the documents should be disclosed.

However, with regard to demand #105, the Metro-North defendants are correct that the demand as stated can be construed as improperly calling for a legal conclusion. And, as to the Town, the Town has represented that it does not employ firefighters and ambulance personnel

and these individuals are employed by other municipalities, including the "Town Fire Commissioner," who, upon information and belief is employed by the Valhalla Fire Department. Therefore, the Town cannot be required to provide the names and addresses of first responders that were not employed by the Town and who have not been identified. However, defendants were required pursuant to the Preliminary Conference Order and Compliance Conference Order to provide the names and addresses of witnesses who they have identified have knowledge regarding this matter and intend to call at trial. While the Metro-North defendants argue in their opposition papers that they have identified the names of representatives such as Albert Santini and James Pepitone and certain other Metro-North witnesses familiar with the third rail, it is unclear from the record before the Court as to whether defendants have identified additional witnesses. Therefore, defendants shall be required to identify all witnesses they intend to call at trial.

Therefore, on or before March 26, 2018, the Metro-North defendants and the Town shall:

1. Supplement their responses to plaintiffs' demands #1, 9, 10, 13, 75, 102, 103, 104, and 106 and provide all documents, photos, videos, studies, recordings, reports, and other materials in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and
2. To the extent that the responding defendants assert that they are not in possession of a document, photo, video, study, report, recordings, or other materials, defendants shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether such documents or materials existed and/or were disposed of and whether any third party has possession of such information; and
3. To the extent that the responding defendants have redacted any document previously produced, they shall provide an unredacted copy of same together with a log detailing such redactions to the Court for in camera review; and
4. With respect to demand 105, defendants shall provided the names and addresses of any witnesses they have identified and whose testimony they intend to introduce at trial or otherwise, including, to the extent such has not been previously provided, the identity of the individuals referred to as the "Power Director", the "MTA Chief Investigator" and the "MTA Sergeant" involved in the investigation of the accident; and
5. To the extent that defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 4 above, defendants shall be precluded from introducing at trial or otherwise any such discovery or testimony and plaintiffs shall be entitled to make an application for an adverse inference at trial with respect to any discovery withheld.

Information regarding the third rail

Plaintiffs' demands #69 and #85-96 seek information regarding the third rail and are principally directed to the Metro-North defendants. Plaintiffs' demand #69 requested, "copies of all purchase documents, purchase records, blueprints, design drawings, maintenance records, repair records, testing (including flammability, safety, metallurgy and stability) records and inspection records for the third rail (including all of its components and support structures) that was installed and present at the Commerce Street grade crossing on the date of the accident." Plaintiffs' demand #85 seeks, "copies of any wall chart of the third rail system for the Harlem line as it existed on the date of the accident." Demand #86 seeks, "copies of all design drawings, blue prints, schematics or other documents or materials regarding, concerning or in reference to the third rail that was then and there existing on the subject rail track starting from the Commerce Street grade crossing and heading North for 1,000 feet." Demand #87 seeks, copies of all documents, design drawings, blueprints, schematics or other materials that provide measurements of the height, width and length of each section of the subject third rail."

Demand #88 seeks, "copies of all documents, design drawings, blueprints, schematics or other materials that provide measurements of the distance from the North side of the Commerce Street grade crossing to where the third rail begins and/or is installed, as well as copies of all documents, design drawings, blueprints, schematics or other materials that provide measurements of the distance from the Commerce Street grade crossing to where the third rail switches from the right side of the track when heading North (such as the accident train was traveling) to the left side of the track." Demand #89 seeks, "copies of any documents, studies, investigations, memorandum or other materials that explain why the third rail switches sides at this location." Demand #90 seeks, "copies of any documents, studies, investigations, memorandum or other materials regarding, concerning or in reference to the design and/or installation of the third rail so that the trains electrical shoes would contact the third rail from underneath." Demand #91 seeks, "copies of any documents, studies, investigations, memorandum or other materials regarding, concerning or in reference to the change of position or orientation of the third rail on the western tracks located near the Commerce Street grade crossing." Demand #92 seeks, "copies of all records regarding, concerning or in reference to the design, installation, maintenance or repair of the third rail located at or near the Commerce Street grade crossing on the date of the accident." Demand #93 seeks, "copies of any photographs, videos, studies or investigations performed on any segments or portions of the third rail involved in the accident."

Plaintiffs' demand #94 seeks, "Copies of all incident reports, inspection reports, power director log reports or RTC log reports regarding, concerning or in reference to any segments of the third rail located at or near the Commerce Street grade crossing from 2010 up to and including the date of the accident. Demand #95 seeks, "copies of all documents, reports, investigations, studies, or any other materials in MNR's possession, custody or control at any time regarding, concerning or in reference to the third rail as it relates to train on vehicles collisions on MNR rail lines." Plaintiffs' demand #96 seeks, "copies of all documents, reports,

investigations, studies, or any other materials in MNR's possession, custody or control at any time regarding, concerning or in reference to third rails installed at or near grade crossings, particularly as the third rail installation and positioning relates to train on vehicles collisions on MNR rail lines."

In response to these various demands, while providing certain documents and objecting to the demands, the Metro-North defendants stated that they were "otherwise conducting a search to determine if there is additional documentation responsive and relevant to the plaintiffs' demands exists."

In summary, plaintiffs assert that to date, the Metro-North defendants have not provided the third-rail design documentation for the Commerce Street crossing that was installed in 1982-1983; specification drawings for the third rail; studies and engineering reports and testing records regarding frangibility, metallurgy, and stability of the third rail at the crossing; repair records or design change records following an accident which occurred in 1984; repair or design change records following the 2015 accident; names of witnesses regarding the third-rail design; and the transcript of statement given by the Metro-North Power Director to NTSB regarding the third rail.

Plaintiffs concede that the Metro-North defendants provided a one page document identified as a "Centrak Task Listing" indicating that the third rail was installed in 1982-1983 when it changed to an electrified third-rail system. However, plaintiffs point out that the document references "Conceptual Planning documents, Feasibility Studies and engineering documentation," yet only certain documents from its Power Department were provided. Plaintiffs state that the documents that were produced include a Specification 808 relating to insulating cover, splice covers and bracket covers from January 30, 2013, but that the documents appear not to relate to the third-rail installation in 1982-3. Plaintiffs admit that the Metro-North defendants also provided five drawings from 1986 (specification numbers SP202, 601-604). However, they complain that these drawings are from several years after the installation of the third rail. Plaintiffs contend that additional documents may exist to show whether the design of the rails was changed following an accident that occurred in 1984.

Plaintiffs concede that although a design change to the third rail post-accident is arguably a post-remedial measure, any post-accident measures designed to make the third rail frangible post-accident would be relevant to the defendants' argument that a design change to the third rail was not feasible. Moreover, plaintiffs argue that since Metro-North does not own the tracks, and the tracks are owned by Argent/TDR, subsequent remedial measures would demonstrate which entity controlled the third rail and was responsible to correct dangerous conditions.

The Metro-North defendants claim that plaintiffs' demands for information regarding the third rail are overly broad, seek "a universe of documents dating back to the creation of Metro-North, and in some instances earlier, with the implementation underrunning third rail design in the early 1900's." While pointing out that they have produced some documents, the

Metro-North defendants argue that the “third rail design was not novel or unique as it was a continuation of a system designed and implemented by New York Central Railroad prior to Metro-North’s existence, with an original design in 1900’s” and state that “upon information and belief, the documents provided to the plaintiff reflect the same component parts, design and installation for Commerce Street on the date of the accident. Defendants are also presently unaware of any design change to the third rail after the 1984 accident.”

The Metro-North defendants also assert, by the unsworn statement of counsel that “despite that underrunning third-rail in comparison to overrunning third rail has no relationship to the subject accident,” and was not found as a factual finding by the NTSB, the response is detailed in the referenced “Railroad Standardization – Notes on Third Rail Electrification” attached as Exhibit “H” to plaintiff’s motion, bate stamp MNR Valhalla 3 Supp 1799. Similarly, as it relates to PSC [plaintiffs] explaining the reason for a switchover, the defendants have provided the track geometry diagram and layout of the third rail of the crossing which details the location of the third rails’ switchover. The PSC appears to improperly seek in a documentary a demand information more appropriately framed as an interrogatory as it seeks an explanation of an engineering principal presumably relating to the continuing contact of the third rail shoe with the third rail as it enters a curve.”

Plaintiffs contend that this documentation is relevant to support their claim that the Metro-North Power Director reported that the designers intended the third-rail to be frangible and break-away in an accident. They argue that notwithstanding this critical issue, the Metro-North defendants have refused to provide studies, reports, engineering reports or drawings supporting the safety or frangibility of the design or any other documentation regarding the third rail.

Specifically with respect to demand #93, plaintiffs also assert that since the train and third rail were moved after the subject accident, plaintiffs were unable to perform any studies on the third-rail and its component parts to study the parts’ frangibility at the time of the accident. They claim that if any studies were performed by Metro-North as to the frangibility and safety of the rail as installed at the time of the accident, these records would also be relevant.

In response, the Metro-North defendants argue that the NTSB prohibits a party representative from conducting a parallel investigation into an accident. They assert that as part of its investigation, the NTSB removed the third rail from the train and rebuilt the third rail, noting and photographing the third rails location within the lead car and determining the sequence in which they entered the car as part of the rebuild. They contend that the NTSB has provided a detailed description, photographs, and diagrams detailing the manner, sequence and resting location of the third rail segments in its August 19, 2015 Railcar Crashworthiness Factual Report, which is available on the public docket. The Metro-North defendants state that they have further supplemented their response to provide further clarification in that the third rail rebuild and the investigation of the segments of the third rail involved in the accident was performed by the NTSB and not Metro-North.

While there is no explanation for the Metro-North defendants' delay in providing a response to demand #93, they cannot be compelled to produce what they do not possess. Therefore, if there were no other studies performed either before or after the subject accident relating to the third rail and/or its design, the Metro-North defendants should so state. Moreover, to the extent that the Metro-North defendants possess no additional photos and videos of the accident and equipment other than that obtained from the MTA Police Department, they should so state and they will be deemed to have substantially complied with demand #93. However, with respect to all other demands regarding the third rail, the Metro-North defendants and the Town shall supplement their responses in so far as such demands seek material and relevant information.

Therefore, on or before March 26, 2018, the Metro-North defendants and the Town shall

1. Supplement their responses to plaintiffs' demands #69 and 85-96 and provide all documents and other materials in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and
2. Such discovery shall include all documents relating to the third-rail design installed in 1982-3; specification drawings for the third rail; studies, reports and testing records regarding frangibility, metallurgy, and stability of the third rail at the crossing; repair records or design change records following an accident which occurred in 1984; repair or design change records following the 2015 accident; the name(s) of witnesses involved in the third-rail design; and the transcript of statement given by the Metro-North Power Director to NTSB regarding the third rail; and
3. To the extent that the responding defendants assert that they are not in possession of a document or other materials, defendants shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether such documents or materials existed and/or were disposed of and whether any third party has possession of such information; and
4. To the extent that defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 3 above, defendants shall be precluded from introducing at trial or otherwise any such discovery or testimony and shall be entitled to make an application for an adverse inference at trial as to documents not produced as of March 26, 2018.

The Locomotive

Plaintiffs' demand #68 is directed to the Metro-North defendants in that they seek information regarding the design specifications of all of the train cars involved in the subject accident. The demand reads as follows, "Copies of all purchase documents, purchase records, blueprints, design drawings, maintenance records, repair records, testing (including flammability

and safety) records and inspection records for all eight (8) railcars that comprised MNR passenger train 659 on the date of the accident. “ In their motion, they state that they later limited the demand to the contract and design specifications/drawings of the lead car, including the pilot or end plate on the lead car, and records of safety testing of the lead car. Plaintiffs contend that the design specifications and design drawings for the lead car are relevant to the inquiry of how the third rail pierced and entered the third car, the flammability of the lead rail car, the engineering controls of the lead car, the design of the engineer’s compartment including sight visibility; the dimensions (height, length, and width of the lead car) so that accident reconstruction measurements could be made of the lead car and its federally required end plate or pilot.

Plaintiffs complain that the Metro-North defendants provided an index to the design specifications but has not provided the specifications or any of the design drawings regarding the lead car or its pilot. Specifically, they state that while the Metro-North defendants have provided some specifications relating to the interior of the third car, windows, and doors, they have not provided the trains “shell” design specifications (height, width, length for exterior and interior) or provided any specifications for the pilot or “end plate.” They assert that the Metro-North defendants’ Fourth Supplemental Response included a “Technical Manual” which provides that the “pilot shall be as large as possible in accordance with Contract Drawing L-4109,” yet Drawing L-4109 was not provided. Plaintiffs add that although the Metro-North defendants have provided a side-angle photograph of the pilot, they have provided no other documentation.

Plaintiffs argue that these documents are relevant since federal regulations require a pilot or end plate. They cite to 49 CFR § 229.123(a) which states that “each lead locomotive shall be equipped with a pilot, snowplow or end plate that extends across both rails. The minimum clearance above the rail of the pilot, snowplow or end plate shall be 3 inches. Except as provided in paragraph (b) of this section, the maximum clearance shall be 6 inches. When the locomotive is equipped with a combination of the equipment listed in this paragraph, each extending across both rails, only the lowest piece of that equipment must satisfy clearance requirements of this section.” Plaintiffs contend that pursuant to this statute, the lead car was required to have a protective shield, known also as a “cow catcher” across the front of the train to prevent items from fouling the track. They claim that if the Metro-North defendants had complied with the federal regulations, Brody’s car would not have been dragged down the track and struck the third rail.

In their opposition papers, the Metro-North defendants state that they have agreed to produce certain information concerning the rail car design “subject to a confidentiality agreement” and that such a confidentiality agreement has been recently provided and that their response supplemented accordingly. As set forth above, this Court has not received any application to approve a confidentiality agreement and no showing has been made as to the necessity of such an agreement. Moreover, since it is unclear on this record whether the Metro-North defendants have provided complete responses to plaintiffs’ demands, the Metro-North

defendants will be directed to provide a complete response. Therefore, plaintiffs have demonstrated that the discovery they seek regarding the locomotive is material and relevant and the Metro-North defendants have not sustained their burden of demonstrating that any privilege attaches or confidentiality issues preclude disclosure.

Therefore, on or before March 26, 2018, the Metro-North defendants shall:

1. Supplement their response to plaintiffs' demands #68 and provide all documents and other materials in their possession or control responsive to such demand with specific reference to such documents and materials, which shall be bates stamped; and

2. To the extent that the responding defendants assert that they are not in possession of a document or other materials, defendants shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether such documents or materials existed and/or were disposed of and whether any third party has possession of such information; and

3. To the extent that defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 2 above, defendants shall be precluded from introducing at trial or otherwise any such discovery or testimony and plaintiffs shall be entitled to make an application for an adverse inference at trial as to documents not produced as of March 26, 2018.

The Lease

In demand 108, plaintiffs demanded that the Metro-North defendants provide the lease between defendants Midtown Ventures and Argent, as owner and lessor of the tracks and Metro-North Railroad, as lessee.¹¹ Plaintiffs state that to date, the Metro-North defendants have

¹¹ Plaintiffs' demand #108 seeks "copies of any leases, contracts or agreements in effect on the date of the accident regarding the property where the Commerce Street grade crossing was located." The Metro-North defendants responded as follows:

"Defendants restate their general objections. Defendants also object to this request to the extent that the demand is vague, overly broad, and/or or unduly burdensome and to the extent that it seeks documentation and information that was not prepared within the regular course of business or within the normal operations of the responding defendants. Subject to and without waiving any objections or adopting any characterizations of plaintiffs' demands, Defendants refer the plaintiffs to the following:

- A. 1998.04.04 Amended and Restated Agreement of Lease
- B. Lease Exhibit A-3, Harlem Line
- C. Lease Valuation Map Segment, MP 26-27."

failed to provide the lease in effect on the date of accident. Rather, a predecessor lease was provided. In opposition to the motion, the Metro-North defendants claim they are “unaware of any further requests from the PSC [plaintiffs] concerning the purported insufficiency in its response by providing the guiding lease agreement relating to the area in which the accident occurred.”

Plaintiffs contend that the lease is relevant to the duties of Metro-North Railroad and TDR/Argent to maintain or repair the tracks and land including the utility building adjacent to the tracks that plaintiffs contend obscured visibility at the subject crossing. This Court finds that the lease is material and relevant and that the Metro-North defendants have not provided any explanation for failing to provide a copy of the actual lease in effect at the time of the accident.

Therefore, on or before March 26, 2018, the Metro-North defendants shall:

1. Supplement their responses to plaintiffs’ demands #108 and provide a copy of the lease in effect at the time of the accident; and
2. To the extent that the Metro-North defendants assert that they are not in possession or control of the lease, they shall provide an affidavit from the individual or individuals who performed the search for the lease which shall include details regarding the search conducted, whether the lease existed and/or was disposed of and whether any third party has possession or control of such lease; and
3. To the extent that the lease is in possession or control of any third party, the Metro-North defendants shall provide an authorization for plaintiffs to obtain same from such third party; and
4. To the extent that the Metro-North defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 3 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to the lease.

Prior accidents

Plaintiffs seek information regarding prior accidents at the crossing. The focus of their complaints with respect to the insufficiency of responses is again directed to the Metro-North defendants. Plaintiffs’ demand #5 seeks, “copies of all documents, reports, records, investigation documents, or other materials regarding, concerning or in reference to any accidents, occurrences, near misses, near hits, vehicles that were stuck, or other incidents that occurred at the Commerce Street grade crossing from 1984 to present. Requested within this demand is the production of all data (in any format), notes, and other information or materials used to produce and/or create the requested records, reports, memorandum and recorded information demanded herein.”

The Metro-North defendants objected in boilerplate fashion as follows:

“Defendants restate their general objections. Defendants further object to this demand to the extent that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this demand to the extent that it seeks documentation and information which is otherwise privileged as attorney work product, attorney client communications, and or materials prepared in anticipation of litigation. Without waiving these objections, defendants state that at this time they are aware of a prior accident on October 10, 1984 involving decedent Gerard W. Dunne. Upon information and belief the Dunne accident at the subject crossing was prior to the installation of active gates and additional active warning devices at the crossing. Defendants refer plaintiffs to the following:

- A. 1984 Crossing Accident, FRA Report
- B. Pleadings and attachments from the 1984 Accident
- C. MNR Crossing Signal Testing and Maintenance
- D. FRA Crossing WBAPS

Defendants further refer the plaintiffs to the privilege log generated in response to this demand. Defendants reserve their rights to raise further objections as to the admissibility, competency, relevancy, materiality, and privilege of this information and documentation.”

In their opposition papers, the Metro-North defendants have taken the position that an accident that occurred in 1984 is irrelevant and is “nothing more than a far-reaching attempt for a fishing expedition.” The Metro-North defendants claim that the 1984 incident and the subject accident are “only similar in that the third rail did not cause either accident occurrence,” that the third-rail did not enter the train in the 1984 accident and that the 1984 accident occurred at a time in which there were no active crossing gates at the subject crossing.

Again, appearing to rely on the NTSB report, counsel for the Metro-North defendants argues in his unsworn affirmation that, “visibility is not at issue in the current accident as the SUV driver was at an active crossing with flashing lights and all of the federal and state required crossing warning systems. In addition, Brody exited her vehicle to observe the flashing gate arm on the back of her car before walking back to her vehicle and driving forward into the path of the train. Furthermore, the third rail played no role in the 1984 accident.” The Metro-North defendants further argue that in response to the PSC’s demands seeking documents related to this accident, defendants have provided a Privilege Log as to the documents that it possesses and produced all pleadings and attachments from the accident as well as the 1984 Crossing Accident FRA report. As discussed with Mr. Maloney of the PSC prior to the filing of the instant motion, defendants are not in the possession of photographs, depositions transcripts, accident witness statements, or any other materials than those produced and listed on its privilege log.

Plaintiffs assert the contrary and argue that the circumstances of that accident were similar to the accident at issue herein. Plaintiffs point out that in the 1984 accident, the car was struck, dragged down the tracks and ripped up the third rail, igniting a fire. Plaintiffs contend that the 1984 accident is relevant to the issue of the frangibility of the third rail.

With regard to specific documents withheld, plaintiffs complain that although the 1984 accident was litigated to trial, the Metro-North defendants have not provided a complete copy of their legal file. They state that they have provided only copies of the Notice of Claims and a Complaint/Answer by the driver's estate and a one-page report. They assert that the Metro-North defendants have not provided any deposition transcripts or photographs of the train and the third rail, witness statements or documents regarding the repairs to the third rail or studies performed after the 1984 accident. They point out that there is no explanation as to why no other documents have been produced while it is clear from their privilege log that the Metro-North defendants retained letters between "attorney and client" regarding the litigation spanning over six years.

In plaintiffs' demand #19, they seek "copies of all documents, reports, records, investigation documents, or other materials regarding, concerning or in reference to any accidents, occurrences, near misses, near hits, vehicles that were stuck, or other incidents that occurred at the Commerce Street grade crossing from 1984 to present. Requested within this demand is the production of all data (in any format), notes, and other information or materials used to produce and/or create the requested records, reports, memorandum and recorded information demanded herein." They point out that the NTSB report has noted that there were 5 to 6 prior gate accidents reported at the subject crossing.

The Metro North defendants objected to this demand as overly broad, unduly burdensome, irrelevant and privileged. The Metro-North defendants argued in opposition to the motion that they provided the historical records of the "Commerce Street Grade Crossing Malfunction Reports and Malfunction Log, MNR Signal Department records for the crossing" and that they further referred to the crossing and signal inspection records previously produced. By the unsworn and unsubstantiated affirmation of their attorney, the Metro-North defendants allege that the records produced reflect that repairs were made on four occasions and not that there were six reports of an accident. Counsel argues that there is no indication in these records that vehicles were trapped or gates came down on a vehicle. The Metro-North defendants also state that they are "presently not in the possession of any additional information concerning the operators of the vehicles that may have damaged a gate arm on those two occasions as the driver does not typically report such incidences."

Plaintiffs have demonstrated that the discovery they seek in demands #5 and #19 is material and relevant and the Metro-North defendants have not, on this record, sustained their burden of demonstrating that any privilege attaches. Therefore, the Metro-North defendants shall:

1. Supplement their responses to plaintiffs' demands #5 and #19, and provide all documents in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; including provide a complete copy of the non-privileged portion of the legal file with respect to the 1984 accident; and

2. To the extent that the Metro-North defendants assert that they are not in possession or

control of such documents or the complete legal file relating to the 1984 accident, they shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether the documents and/or file existed and/or was disposed of and whether any third party has possession or control of such documents or file; and

3. To the extent that the complete legal file is in possession or control of any third party, the Metro-North defendants shall provide an authorization for plaintiffs to obtain the non-privileged portion of same from such third party; and

4. To the extent that the Metro-North defendants claim that there are protected attorney-client communications or documents contained in the legal file that are not subject to disclosure, the Metro-North defendants shall provide to this Court a copy of such documents together with a detailed privilege log; and

5. To the extent that the Metro-North defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 4 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to documents withheld as of March 26, 2018.

The Crossing and Safety Studies

Plaintiffs' complaints regarding responses to their demands for information with respect to the crossing are directed to all defendants. Plaintiffs' demand #8 seeks, "copies of any documents, correspondence, directives, orders or other communications of any kind from the National Transportation Safety Board ("NTSB"), Federal Railroad Administration ("FRA"), New York Public Transportation Safety Board ("NYPTSB") or the New York State Department of Transportation ("NYSDOT") to any of the named defendants regarding, concerning or in reference to any grade crossings on any MNR lines from January 1, 2010 up to and including the present."

While providing some documents, in boilerplate fashion, the Metro-North defendants also responded that, "Defendants also object to these demands to the extent that they seek documentation and information not subject to discovery or otherwise admissible pursuant to 23 U.S.C.A. § 409, 49 U.S.C. § 20903, 49 U.S.C. § 20907, 49 U.S.C.A. § 20703, and 23 U.S.C.A. § 152." The Metro-North defendants further state that, "defendants are conducting a search and will provide any additional responsive records, to the extent that they exist, for the subject Commerce Street Crossing for a period of 5 years prior to and including the date of the accident. Defendants further reserve their rights to raise further objections as to the admissibility, competency, relevancy, materiality, and privilege of any responsive information and documentation subsequently produced."

Plaintiffs' demand #16 seeks "copies of all documents, reports, photographs, videos,

violations, investigations, defects and other information or material regarding, concerning or in reference to any inspections of the Commerce Street grade crossing performed by the MNR, Metropolitan Transportation Authority ("MTA"), FRA, NTSB or NYSDOT from 2010 till the end of 2015." Demand #19 seeks "copies of all grade crossing malfunction documents or reports for the Commerce Street grade crossing from 1984 to present." The Town has withheld a full response to this demand, citing privilege but identifying a responsive document as "Draft of NTSB Highway Factors and Railroad Grade Crossing Group Chairman's Factual Report with comments by David Smyth, 6-10-15."

In their demand #20, plaintiffs demanded a "list identifying any and all public and/or private rail-grade crossings that have been closed by any of the defendants since January 1, 1984 to present. In your response please provide the Department of Transportation crossing/identification number, the date the crossing was closed, the location of the crossing (including the name of the town, village, county, etc.) and a description of the type of crossing that was closed. (a) (a) Requested within this demand is the production of records, reports, data, documents, studies or other materials utilized to, (i) initiate the above referenced closure(s), (ii) assess the feasibility/necessity of the closure(s), (iii) study the impact of the closure(s) and/or (iv) perform, complete or execute the closure(s)."

The Metro-North defendants objected to these demands on various grounds, including that post-accident records may be considered subsequent remedial measures and that "they seek documentation and information not subject to discovery or otherwise admissible pursuant to 23 U.S.C.A. § 409, 49 U.S.C. § 20903, 49 U.S.C. § 20907, 49 U.S.C.A. § 20703, and 23 U.S.C.A. § 152."

In demand #21, plaintiffs seek, "copies of any petitions and/or requests by any of the defendants to close the Commerce Street grade crossing, including at any time subsequent to the date of the accident involved in the instant action. (a) If no such requests were ever made provide a verified statement to that effect. (b) If any applicable petitions and/or requests were made, provide copies of all materials, documents, information and data used to assess and determine the need for such a petition/request, as well as copies of all supporting documents, information, materials and data." While objecting to this demand, the Metro-North defendants asserted that "this information would have been generated and in the possession of the Town of Mount Pleasant and/or the Department of Transportation."

In Demand #22, plaintiffs seek, "copies of any internal reports prepared at any time, by any of the named defendants, used to support any requests to close the Commerce Street grade crossing." In plaintiffs demand #23, plaintiffs seek "copies of all studies, plans, design drawings, blueprints, photos, progress photos, schematics and other documents, data and materials regarding, concerning or in reference to the design, installation, construction, repair, inspection, and maintenance of the Commerce Street grade crossing."

Plaintiffs argue that while they have been provided with some documents in response to

their demands #20-23, the Metro-North defendants made several objections, and then indicated that they were still searching for documents. In Metro North's Fourth Supplemental Response, it again indicated that the defendants were "conducting a search to determine if any additional responsive documentation" exists. They additionally argue that the documents provided by Metro North in response to demand #23 do not relate to the design, installation or construction of the crossing. Plaintiffs' argue, and this Court agrees, that while the Metro North defendants have indicated that they are still searching to determine if documents responsive to this demand exist, they have had more than enough time to do so.¹²

In their demands #25 and 26, plaintiffs sought documents regarding any improvements or requests for improvements at the crossing including studies. Demand #25 seeks, "copies of any documents regarding, concerning or in reference to any upgrade or improvement, or any request, direction or order to upgrade or improve the Commerce Street grade crossing at any time.

(a) Requested within this demand is the production of any studies, investigations, data or other materials that were used to support any such request, direction or order to upgrade or improve the Commerce Street grade crossing. (b) Additionally, requested within this demand is the production of any documents, studies, investigations, data or other materials that were used or prepared in connection with any requested or proposed upgrade or improvement that was ultimately NOT implemented or approved. Include any documentation reflecting the rejection and disapproval of the proposed upgrade and/or improvement." Demand #26 seeks, "production of any accident prediction studies, investigation, or ranking of the Commerce Street grade crossing from 1984 up to and including the date of the accident."

In response to demands #25 and 26, the Metro-North defendants argued that such documents are irrelevant post-accident records which may be considered subsequent remedial measures. They further stated that they were unable to determine what "rankings" the plaintiffs are referring to as part of this demand.

Plaintiffs add in response to the Metro-North defendants' assertion that any documents responsive to their requests are somehow privileged pursuant to federal regulations, these projects were not supported by federal funds and thus no federal privilege applies. This Court notes that while the Metro-North's defendants have stated in boilerplate fashion in several responses that disclosure is prohibited by "23 U.S.C.A. § 409, 49 U.S.C. § 20903, 49 U.S.C. § 20907, 49 U.S.C.A. § 20703, and 23 U.S.C.A. § 152" they have failed to demonstrate that a federal privilege attaches to plaintiffs' demands. They have also failed to present any compelling

¹² For example, in opposition to the motion, counsel for the Metro-North defendants states that, "Upon information and belief, certain feasibility studies of the project were performed prior to the start of the electrification project. Defendants are searching for these documents in archives so that they may be produced in response to the PSC [plaintiffs] demands. " However, no information has been provided as to why production of such documents has been significantly delayed.

argument in this regard. Rather, in opposition to the motion, the Metro-North defendants, by their attorneys, claim only in conclusory fashion that “furthermore the privileges attached to any such documents by operation of the federal statutes are not waived with respect to the admissibility of any future disclosure.” Such is insufficient to sustain their burden with respect to the privilege asserted.

Further plaintiffs argue that the Metro North defendants have provided an “Index and Revision Notes providing historical details of the changes and work performed at the Commerce Crossing” but have refused to provide the actual studies, design drawings, or documentation showing what changes specifically have been made at the crossing.

In their demand #27, plaintiffs seek, “copies of all studies, plans, design drawings, blueprints, photos, progress photos, schematics and other documents, data and materials regarding, concerning or in reference to the design, planning, installation, decision to install, construction, repair and maintenance of the substation structure located at the Commerce Street grade crossing.” Plaintiffs claim this information is relevant to their argument that there were sight visibility issues at the crossing. In response, the Metro-North defendants have provided only a design drawing of the building and a 1984 FRA accident report which provides “view of track obscured by permanent structure.” In opposition to the motion, the Metro-North defendants argue that the building is a substation and that they are “attempting to locate the historic design and placement of the substation at the start of the Harlem Line Electrification Project which will be produced upon their receipt as referenced above.” they add that “with respect to the PSC claims that the sight visibility was at issue in the present case, defendants note that sight visibility was not addressed as a contributing issue in the NTSB’s factual reports. “ As previously indicated, the Metro-North defendants’ reliance on the findings contained in the NTSB report does not constitute an adequate excuse for failing to provide this discovery in a timely manner.¹³

In particular, in this accident, unlike the 1984 accident, the Grade Crossing was equipped with passive and active warning devices, including cross-bucks, flashing lights, and automatic gates, which were all in good working condition and in full compliance with state and federal regulations on the date in question. Considering the extreme differences between the 1984 accident and the subject accident, sight distance or the design of the substation is not a relevant area for discovery.

Plaintiffs complain that the Metro-North defendants have not produced a privilege log in reference to this demand or any further documentation relating to the “permanent structure” that

¹³Plaintiffs further advise that in response to a FOIL request, plaintiffs received a redacted document referring to a project that was studied, proposed, and funded between the State DOT and Metro-North Railroad, PIN 8932.37. They state that the document refers to a 2009 Commerce Street Metro-North Railroad Crossing Upgrade Project at mile post 26.6. Plaintiffs argue that they have received no documentation with respect to this project.

obscured the view of the track. Similarly, plaintiffs complain that the Town's objections to providing documents regarding site visibility issues at the crossing and assertion that such would constitute post remedial measures are without merit. Plaintiffs posit that the Town cannot maintain that such is a post-accident remedial measure, while claiming it had no responsibility or duties in relation to the utility building. Further, plaintiffs point out that the Town concedes on this motion in its counsel's affirmation in opposition that if there is an issue of control and duty, post remedial measure discovery is not precluded from discovery because it would be relevant on the issue of control and duty.

Further, with respect to their response to demand # 43, the Metro-North defendants have referred to "Index and Revision Notes, Commerce Street Crossing" but have not provided same. In plaintiffs' demand #60, plaintiffs requested that the defendants "identify the names of any internal teams, committees, units, groups, and/or departments for any of the defendants that are charged with the safety of grade crossings from 2010 to present. (a) Copies of notes, minutes, surveys, reports, investigations and all other documents regarding grade-crossings from any of the above-referenced teams, committees, units, groups, and/or departments from 2010 to present. In response, the Town identified documents responsive to this demand, listed such documents on a privilege log but withheld same on the grounds that the documents were "subsequent remedial measures." Plaintiffs restate that since the Town claims it had no duty as to the subject crossing, specifically as asserted as an Affirmative Defense in their Answer, such documents are relevant to the issue of control at the crossing. Similarly, the Metro-North defendants objected to the demand and refused to provide the discovery.

In demand #61, plaintiffs requested that defendants "identify the names of any departments, teams, committees, units, groups, or other affiliated entities of the State of New York, Westchester County, Town of Mt. Pleasant and/or Hamlet of Valhalla, that any of the defendants consulted, assisted, participated or otherwise interacted with in regards to, concerning or in connection with the design, safety, installation, repair, maintenance, management, closure, and/or safety of grade crossings from 2010 to present. (a) Copies of notes, minutes, records, reports, studies and other documents or materials from the above-referenced departments, teams, committees, units, groups, or other affiliated entities from 2010 to present." In response, the Metro-North defendants restated their general objections but also objected on the grounds that plaintiffs seek documentation which would include post-accident records or evidence of subsequent remedial measures or "otherwise seeks information for a crossing other than the Commerce Street Crossing." Plaintiffs claim that to date, the Metro-North defendants have not responded to this demand although in their Third and Fourth Supplemental Response, they indicated that they would provide same. Further in response to demand #68, they state that both the MTA and Metro-North Safety Department are familiar with grade crossing safety and "at the time for the designation of witnesses for depositions, defendants will provide and designate an appropriate witness to testify."

In their demand #71, plaintiffs seeks "copies of any application, petitions or requests for any Federal or State funds to initiate, institute or continue any safety projects or initiatives

pertaining to grade crossings.” In its Fourth Supplemental Response, the Metro-North defendants refer plaintiffs to a document entitled, “E. NYSDOT Grade Crossing Improvement Project.” However, plaintiffs state that the Metro North defendants have not provided plaintiffs with an unredacted copy of this document or any supporting documentation regarding this document such as design drawings, contracts, engineering reports or studies. The plaintiffs also question whether this document is responsive to their request since the face of the unredacted report states that no federal funds were used.

Demand #79 seeks, “copies of all findings, directives, orders, recommendations or other materials issued by the FRA to MNR as a result of Operation Deep Dive that are related to grade crossings and the operation of any trains at or near grade crossings.” Demand #80 seeks, “copies of any documents or materials regarding, concerning or in reference to any corrective actions, responses, implementations or other actions that MNR undertook in response to FRA Operation Deep Dive that relate to grade crossings or the operation of MNR trains at grade crossings.” Plaintiffs point out that prior to the accident at issue, an investigatory report called “Operation Deep Dive,” was issued by the Federal Railroad Administration following four Metro-North accidents in 2013. They claim that this report detailed safety concerns and Metro-North’s failure to comply with Federal requirements for the operation of trains over grade crossings. Plaintiffs claim that the Metro-North defendants have provided no documents related to these demands. In their response, the Metro-North defendants objected and stated that, “Subject to and without waiving any objections or adopting any characterizations of plaintiffs’ demands, Defendants are conducting a search to obtain certain documentation responsive and relevant to the plaintiffs’ demands as it relates to the subject crossing.”

Demand #81 seeks “copies of any documents, minutes, notes, memorandum or other materials from the MNR Safety Department regarding grade crossings from 2010 up to the present.” The Metro-North defendants responded that “defendants are otherwise conducting a search to obtain certain documentation responsive and relevant to the plaintiffs’ demands.” The Court notes that in their opposition papers, the Metro-North defendants again state that they are conducting a search “for documentation related to the Commerce Street Crossing from the Safety Department from 2010 to the date of the accident which will provided within 45 days, to the extent that it exists,” yet no explanation for the delay has been provided.

Plaintiffs have demonstrated that the discovery they seek regarding the crossing and safety studies is material and relevant and neither the Metro-North defendants nor the Town have, on this record, sustained their burden of demonstrating that any privilege attaches.

Therefore, on or before March 26, 2018, the Metro-North defendants and the Town shall:

1. Supplement their responses to plaintiffs’ demands #8, 16, 19, 20-23, 25-27, 43, 60-61, 71 and 79-81 and provide all documents in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and;

2. To the extent that the responding defendants assert that they are not in possession or control of such documents, they shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether the documents were disposed of and whether any third party has possession or control of such documents; and

3. To the extent that the responding defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 2 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to the documents withheld.

Traffic Signal and Lights

In their demands # 32-35, plaintiffs seek information regarding the traffic signals at the crossing. Again, the Metro-North defendants' responses are insufficient and incomplete and the Town has asserted that responses to same are privileged. Demand #32 seeks, "copies of all studies, plans, design drawings, blueprints, photos, progress photos, schematics and other documents, data, records, and materials regarding, concerning or in reference to the design, installation, construction, repair, inspection, testing, and maintenance of the highway traffic signals that existed at the intersection of the Taconic State Parkway and Commerce Street on the date of the accident." Demand # 33 seeks, "copies of all studies, plans, design drawings, blueprints, photos, progress photos, schematics and other documents, data, records, and materials regarding, concerning or in reference to the design, installation, construction, repair, inspection, testing, and maintenance of the preemption system and/or connection (if any) with the highway-rail grade crossing warning system that existed at the Commerce Street grade crossing on the date of the accident." Demand # 34 seeks production of "any documents reflecting any complaints (from civilians, officials, defendants' employees or anyone else) regarding, concerning or in reference to the pre-emption connection and/or system that existed at the Commerce Street grade crossing on the date of the accident." Demand #35 seeks, "copies of any maintenance, inspection and testing documents, records, reports, data or other materials regarding, concerning or in reference to the timing of the pre-emption systems (if any) that existed at the Commerce Street grade crossing on the date of the accident. "

Plaintiffs argue in support of their motion that after the subject accident, the Commerce Street intersection traffic signal was reconfigured to give a train priority at the intersection and to allow more time to clear traffic at the light. They admit that they have obtained the Traffic Light Control Specifications and Light Sequence documentation for the traffic signal in effect at the time of the accident. However, they assert that since the Metro-North defendants have claimed they had no responsibility or duty as to this traffic signal, they are entitled to all documents regarding the subsequent remedial measures to reconfigure the traffic signal post-accident. They note that while they have received a redacted copy of a contract between Metro-North Railroad and the State referring to the subject traffic signal and the timing of the lights on the traffic signal, the Metro-North defendants have not provided an unredacted copy of this document, nor

has it provided any documentation, design drawings, and specifications, regarding the contract.

In their demand #37, plaintiffs seek, "copies of any results, data, documents or other materials from any periodic joint inspections of highway traffic signal pre-emption interconnections that existed at the Commerce Street grade crossing from 2000 to present." The Metro-North defendants responded that "defendants are presently not in the possession of any such joint inspections of the preemption circuit, but to the extent that such "joint testing" exists that is prepared within the usual course of business of the responding defendants, the same will be produced for a period of 3 years prior to and including the date of the accident. Responding defendants are conducting a search to obtain determine [sic] if documentation responsive and relevant to the plaintiffs' demands exists."

In their opposition papers, the Metro-North defendants assert that the light preemption documentation, is maintained by the State and that they have produced all responsive documentation related to the system. They explain that the Department of Transportation (DOT) maintains its own equipment related to the light preemption system and that Metro-North only maintains a preemption circuit which is detailed in "Test 26 of the MNR Communications and Signal Department Testing, CS2." They further state that, "Defendants are not aware of any additional testing documentation or requirements of Metro-North as it relates to the testing of the preemption circuit or the preemption interconnections outside of what has been noted in its prior responses." The Town has responded that documents exist responsive to demand #32, 33 and 35, but that such are privileged and protected from disclosure.

Plaintiffs have demonstrated that the discovery they seek regarding the lights at the crossing is material and relevant and neither the Metro-North defendants nor the Town have, on this record, sustained their burden of demonstrating that any privilege attaches.

Therefore, on or before March 26, 2018, the Metro-North defendants and the Town shall:

1. Supplement their responses to plaintiffs' demands #32-35 and 37 and provide all documents in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and

2. To the extent that the responding defendants assert that they are not in possession or control of such documents, they shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether the documents were disposed of and whether any third party has possession or control of such documents; and

3. To the extent that the responding defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 2 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to the documents withheld.

All other arguments raised and evidence submitted by the parties has been considered by this Court notwithstanding the specific absence of reference thereto.

Accordingly, it is ORDERED that plaintiffs' motion is granted to the following extent:

On or before March 26, 2018, the Metro-North defendants and the Town shall:

- (A)
1. Supplement their responses to plaintiffs' demands #1, 9, 10, 13, 75, 102, 103, 104, and 106 and provide all documents, photos, videos, studies, recordings, reports, and other materials in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and
 2. To the extent that the responding defendants assert that they are not in possession of a document, photo, video, study, report, recordings, or other materials, defendants shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether such documents or materials existed and/or were disposed of and whether any third party has possession of such information; and
 3. To the extent that the responding defendants have redacted any document previously produced, they shall provide an unredacted copy of same together with a log detailing such redactions to the Court for in camera review; and
 4. With respect to demand 105, defendants shall provide the names and addresses of any witnesses they have identified and whose testimony they intend to introduce at trial or otherwise, including, to the extent such has not been previously provided, the identity of the individuals referred to as the "Power Director", the "MTA Chief Investigator" and the "MTA Sergeant" involved in the investigation of the accident; and
 5. To the extent that defendants fail or refuse to provide the discovery as ordered in paragraphs (A) 1-4 above, defendants shall be precluded from introducing at trial or otherwise any such discovery or testimony and plaintiffs shall be entitled to make an application for an adverse inference at trial with respect to any discovery withheld as of March 26, 2018.
- (B)
1. Supplement their responses to plaintiffs' demands #69 and 85-96 and provide all documents and other materials in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and
 2. Such discovery shall include all documents relating to the third-rail design

installed in 1982-3; specification drawings for the third rail; studies, reports and testing records regarding frangibility, metallurgy, and stability of the third rail at the crossing; repair records or design change records following an accident which occurred in 1984; repair or design change records following the 2015 accident; the name(s) of witnesses involved in the third-rail design; and the transcript of statement given by the Metro-North Power Director to NTSB regarding the third rail; and

3. To the extent that the responding defendants assert that they are not in possession of a document or other materials, defendants shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether such documents or materials existed and/or were disposed of and whether any third party has possession of such information; and

4. To the extent that defendants fail or refuse to provide the discovery as ordered in paragraphs (B) 1 through 3 above, defendants shall be precluded from introducing at trial or otherwise any such discovery or testimony and shall be entitled to make an application for an adverse inference at trial as to documents not produced as of March 26, 2018.

(C) 1. Supplement their response to plaintiffs' demands #68 and provide all documents and other materials in their possession or control responsive to such demand with specific reference to such documents and materials, which shall be bates stamped; and

2. To the extent that the responding defendants assert that they are not in possession of a document or other materials, defendants shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether such documents or materials existed and/or were disposed of and whether any third party has possession of such information; and

3. To the extent that defendants fail or refuse to provide the discovery as ordered in paragraphs (C) 1 through 2 above, defendants shall be precluded from introducing at trial or otherwise any such discovery or testimony and plaintiffs shall be entitled to make an application for an adverse inference at trial as to documents withheld as of March 26, 2018.

(D) 1. Supplement their responses to plaintiffs' demands #108 and provide a copy of the lease in effect at the time of the accident; and

2. To the extent that the Metro-North defendants assert that they are not in

possession or control of the lease, they shall provide an affidavit from the individual or individuals who performed the search for the lease which shall include details regarding the search conducted, whether the lease existed and/or was disposed of and whether any third party has possession or control of such lease; and

3. To the extent that the lease is in possession or control of any third party, the Metro-North defendants shall provide an authorization for plaintiffs to obtain same from such third party; and

4. To the extent that the Metro-North defendants fail or refuse to provide the discovery as ordered in paragraphs (D) 1 through 3 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to the lease not produced as of March 26, 2018.

(E) 1. Supplement their responses to plaintiffs' demands #5 and #19, and provide all documents in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; including provide a complete copy of the non-privileged portion of the legal file with respect to the 1984 accident; and

2. To the extent that the Metro-North defendants assert that they are not in possession or control of such documents or the complete legal file relating to the 1984 accident, they shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether the documents and/or file existed and/or was disposed of and whether any third party has possession or control of such documents or file; and

3. To the extent that the complete legal file is in possession or control of any third party, the Metro-North defendants shall provide an authorization for plaintiffs to obtain the non-privileged portion of same from such third party; and

4. To the extent that the Metro-North defendants claim that there are protected attorney-client communications or documents contained in the legal file that are not subject to disclosure, the Metro-North defendants shall provide to this Court a copy of such documents together with a detailed privilege log; and

5. To the extent that the Metro-North defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 4 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to documents

withheld as of March 26, 2018.

- (F)
1. Supplement their responses to plaintiffs' demands #8, 16, 19, 20-23, 25-27, 43, 60-61, 71 and 79-81 and provide all documents in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and;
 2. To the extent that the responding defendants assert that they are not in possession or control of such documents, they shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether the documents were disposed of and whether any third party has possession or control of such documents; and
 3. To the extent that the responding defendants fail or refuse to provide the discovery as ordered in paragraphs (F) 1 through 2 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to the documents withheld as of March 26, 2018.
- (G)
1. Supplement their responses to plaintiffs' demands #32-35 and 37 and provide all documents in their possession or control responsive to such demands with specific reference to such documents and materials, which shall be bates stamped; and
 2. To the extent that the responding defendants assert that they are not in possession or control of such documents, they shall provide an affidavit from the individual or individuals who performed the search for same which shall include details regarding the search conducted, whether the documents were disposed of and whether any third party has possession or control of such documents; and
 3. To the extent that the responding defendants fail or refuse to provide the discovery as ordered in paragraphs 1 through 2 above, they shall be precluded from introducing at trial or otherwise any such discovery and plaintiffs shall be entitled to make an application for an adverse inference at trial as to the documents withheld as of March 26, 2018;

and it is further

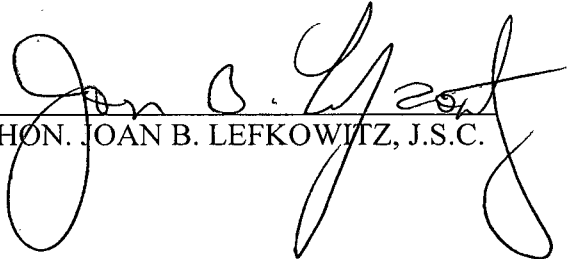
ORDERED that any request for relief not specifically addressed herein is denied; and it is

ORDERED that counsel for the parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on April 11, 2018 at 2:00 p.m.

ORDERED that plaintiffs shall serve a copy of this Order with notice of entry on defendants within ten days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 26, 2018


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