

1 ILLINOIS COMMERCE COMMISSION

2 CHESSIE LOGISTICS COMPANY,)
LLC,)
3 Petitioner,)
vs.) Docket No. T13-0047
4 KRINOS FOODS, INC., a/k/a)
KRINOS HOLDINGS, INC.,)
5 Respondent.)

6

7 Met Pursuant to Notice at 1:30pm

8

9 BEFORE:

10 LATRICE KIRKLAND MONTAQUE,
11 Administrative Law Judge.

12

13 PRESENT:

14 SENIOR RAIL SAFETY SPECIALIST

15 MR. BRIAN VERCRUYSSSE

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20 Representing ICC Staff;

21 MS. ARIEL ERBACHER

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Representing Chessie Logistics

Company, LLC;

FIGLIULO & SILVERMAN, P.C., by
MR. PETER A. SILVERMAN and
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Representing Krinos Foods, Inc.

1 ADMINISTRATIVE LAW JUDGE MONTAQUE: By the
2 power vested in me by the State of Illinois and the
3 Illinois Commerce Commission, I now call Docket
4 Number T13-0047 for hearing. This is in the matter
5 of Chessie Logistics Company, LLC, Petitioner,
6 versus Krinos Foods, Inc., a/k/a Krinos Holdings,
7 Inc. They have filed a formal complaint.

8 May I have appearances, please? Let's
9 start with Petitioner.

10 MS. ERBACHER: Ariel Erbacher, your Honor,
11 counsel for Petitioner.

12 ADMINISTRATIVE LAW JUDGE MONTAQUE: Can you
13 spell your name for the record?

14 MS. ERBACHER: A-r-i-e-l E-r-b-a-c-h-e-r.

15 ADMINISTRATIVE LAW JUDGE MONTAQUE: Okay. And
16 for Respondent?

17 MR. SILVERMAN: My name is Peter Silverman,
18 S-i-l-v-e-r-m-a-n, and my partner.

19 MR. PORTER: Marc Porter, M-a-r-c P-o-r-t-e-r.

20 ADMINISTRATIVE LAW JUDGE MONTAQUE: Staff?

21 MR. VERCRUYSSSE: Thank you, your Honor. Brian
22 Vercruysse, V-e-r-c-r-u-y-s-s-e, representing the
23 Rail Safety Section of the Illinois Commerce
24 Commission. Thank you.

1 ADMINISTRATIVE LAW JUDGE MONTAQUE:

2 Ms. Erbacher, you have a complaint here. This is a
3 status hearing today. And for the Commission's
4 purposes, I think the question that I need to ask
5 and that we need to answer is whether the
6 Commission has jurisdiction over this particular
7 complaint.

8 And I'm looking at the complaint. It says
9 parties in jurisdiction.

10 MS. ERBACHER: Yes, your Honor.

11 ADMINISTRATIVE LAW JUDGE MONTAQUE: My reading
12 of the statutes that are cited in this particular
13 complaint, let's see here, violation basically of
14 5/18c-7502(a) and (b) I believe, (b) being the
15 penalties.

16 MS. ERBACHER: Yes. Two subparts of (a) and
17 with (b) is the listing of the penalties, your
18 Honor.

19 ADMINISTRATIVE LAW JUDGE MONTAQUE: Okay. I'm
20 going to flip to that. Just give me a second.

21 MS. ERBACHER: Certainly.

22 ADMINISTRATIVE LAW JUDGE MONTAQUE: That
23 section of the law is entitled Malicious Removal of
24 or Damaging to Railroad Property or Freight.

1 MS. ERBACHER: Yes, your Honor.

2 ADMINISTRATIVE LAW JUDGE MONTAQUE: You cited
3 Section (a)(1) and (a)(4).

4 My understanding and my reading of the
5 statute in its entirety is that that particular
6 statute does not empower the Commission to enforce
7 that proceeding. If you'd look closely at
8 Subsection (b), Penalties, within that section,
9 first of all, it says that -- and I'm
10 paraphrasing -- if the railroad property damage
11 does not exceed \$500 and no bodily injury occurs to
12 another as a result of violation of the section,
13 the person shall be guilty of a Class A
14 misdemeanor. Upon being found in violation of
15 Item 1, Subsection (a), the person shall, in
16 addition to such other sanctions as may be deemed
17 appropriate by the Court. The statute specifically
18 identifies the Court as the enforcer of this
19 statute.

20 And, also, if you look at Section 3, it
21 says local authorities shall impose fines as
22 established in this Section (b) for persons found
23 in violation of the section or any other similar
24 local ordinances.

1 My interpretation of that is that this
2 would be more properly addressed by the Circuit
3 Court, especially given that the penalties are of a
4 criminal nature. You've got misdemeanors and
5 felonies.

6 The Commission is a creature of statute.
7 Everything we do, our power, what we are authorized
8 to do is authored by statute. And in that
9 particular section, I don't see where the
10 Legislature gave the Commission specific authority
11 to enforce.

12 By contrast, if we look at another
13 statute -- I won't go into great detail -- but I'm
14 looking at Section 625 ILCS 5/18c-7401 entitled
15 Safety Requirements for Track Facilities and
16 Equipment. And I am just going to pull out some
17 language in there. In contrast there it says no
18 public road, highway, or street shall hereafter be
19 constructed across the track of any rail carrier at
20 grade, nor shall the tracks of any rail carrier be
21 constructed across a public road, highway, or
22 street at grade without having first secured
23 permission of the Commission.

24 It specifically identified the Commission

1 as the agency authorized to grant permission. That
2 section empowers the Commission to grant
3 permission.

4 There is another paragraph: The
5 Commission shall also have power by its orders to
6 require the reconstruction, minor alteration, minor
7 relocation, et cetera. Again, the language is very
8 specific stating that the Commission shall have
9 power.

10 Nowhere in the statute that's cited for
11 the violations in the instant case do I see
12 anywhere where the Legislature empowers the
13 Commission in that fashion. So that's just my take
14 on it.

15 I do believe that this particular case is
16 probably more properly brought in the Circuit
17 Court. I don't know where you guys want to go with
18 it based on that, if you have any thoughts.

19 Go ahead, Mr. Vercruysse, do you have
20 anything to say?

21 MR. VERCRUYSSE: Thank you.

22 When this was first communicated to Staff
23 there was the underlying question as far as
24 jurisdiction and this not being something that's

1 usually handled through our administrative law
2 process in reviewing different cases or the history
3 with the railroads that I have for 13 years here, I
4 have only had one item where it's ever related to
5 the malicious damage. But that was a chain saw
6 going through a railroad gate and the underlying
7 was the immediate concern with safety and that's
8 where we were involved.

9 After that, I didn't see but one case
10 brought to the DuPage County Circuit Court in which
11 the railroad didn't show up and the case was
12 dismissed. That's the limited knowledge base I
13 have with it.

14 ADMINISTRATIVE LAW JUDGE MONTAQUE: I
15 understand.

16 MR. VERCRUYSSSE: Thank you.

17 ADMINISTRATIVE LAW JUDGE MONTAQUE: And that
18 would be consistent in terms of what I've just
19 stated. In terms of the Commission's authority, as
20 far as I understand and based on my experience, is
21 directed toward focused on is safety, rail safety.
22 And that, in fact, is the name of our division
23 here, railroad safety, dealing with railroads
24 crossing, authorized modification and alteration of

1 crossings.

2 There is some jurisdiction over the yards,
3 I understand the safety of the yards for employees.
4 I think that is another section where the language
5 is very clear. However, I am certain that the
6 references here to the Court indicate to me that
7 this is something that the courts are expected to
8 handle.

9 MR. VERCRUYSSSE: If I might add, the only other
10 item that might get into personal property rights
11 or actually real estate rights is the Commission's
12 authority over eminent domain proceedings where the
13 eminent domain has to be authorized by the
14 Commission and that's spelled out in the statutes
15 clearly and then brought to the next phase within
16 the courts. Here we don't have that distinction.

17 MR. PORTER: I would also add there are
18 questions raised about whether you have authority
19 to make rulings pertaining to easement rights,
20 property interests, and things like that.

21 MS. ERBACHER: Your Honor, the question of
22 property interest is a question of fact that we
23 would have to deal with in an evidentiary hearing.

24 My client came before the Illinois

1 Commerce Commission because we had read that the
2 Commission had the power to administer and enforce
3 the Illinois Commercial Transportation Law under
4 18c-1202, and under 18c-1702 had the duty to
5 enforce the provisions of this chapter, which we
6 interpreted to mean 18c and which would include
7 conducting investigations, making arrests. That
8 duty is, of course, shared with the state police
9 and the Secretary of State.

10 It seemed that the Commerce Commission had
11 a duty to enforce the provision that -- enforced
12 provisions of 18c, which we are bringing suit
13 under.

14 And in addition to that, your Honor, we do
15 have an issue of rail safety. The tracks that were
16 damaged by Respondent's conduct, those tracks
17 constituted the only space on the line where we
18 have a flat switch yard. It's a unique area on the
19 line that is important for -- in fact, that is
20 vital to operations that were basically destroyed.
21 And as such, it has impeded my client's ability to
22 operate safely, to be able to switch cars safely.

23 So that was another reason we brought this
24 here, as well as the fact that the way that the

1 tracks were buried was indicative of conduct that
2 either was unaware or did not appreciate the real
3 safety risks of being neighbors with a railroad
4 line and a railroad yard.

5 So that is why we thought that there were
6 safety concerns with regards to this case,
7 especially after the events that I made mention of
8 in my -- the motion I made for a preliminary
9 injunction where we had earth movers that were
10 going across tracks and weakening the integrity of
11 the rails and we had individuals actually
12 trespassing onto active railroad lines.

13 So this is why we've brought this matter
14 before the ICC.

15 ADMINISTRATIVE LAW JUDGE MONTAQUE: Again --
16 I'm sorry.

17 MR. SILVERMAN: I would comment -- I'm sorry.
18 I didn't mean to interrupt. But in terms of
19 whether this is a safety issue, my understanding is
20 that the tracks have not been operated for quite
21 some time and that Petitioner here bought the
22 tracks recently and is now taking steps to try to
23 repair them apparently. We don't know.

24 But it doesn't appear to be something that

1 is a safety issue. It appears to be related to
2 property rights that we strongly disagree with. We
3 strongly disagree with a lot of the factual
4 assertions that have been made. But I understand
5 that's not the issue right now.

6 In terms of the Commission's jurisdiction,
7 we don't take a position. It's for your Honor to
8 decide I would believe.

9 If the question comes down to safety, the
10 conditions that have existed have existed for some
11 time there. And to suggest that there is some risk
12 to people is --

13 ADMINISTRATIVE LAW JUDGE MONTAQUE: I
14 understand. I get it. But, again, I'm going to go
15 back to what I know -- and please correct me if I'm
16 wrong, Mr. Vercruysse -- the safety issues,
17 typically our jurisdiction is regarding crossings.

18 Are we talking about a crossing here; a
19 railroad where there is a road or path crossing the
20 track?

21 MS. ERBACHER: The place where the spur track
22 is located that was buried is right before -- there
23 is a public crossing right in that area. The
24 specific place where the actions took place and the

1 track was buried, though, is not on the street or
2 it's next to the street.

3 And if I may, your Honor, I apologize, for
4 the sake of the record, those tracks are tracks
5 that my client has to go through in order to reach
6 freight. Those tracks have been used for many
7 years by the Indiana Harbor Belt. They are viable
8 tracks. It was my client's right and discretion to
9 determine the usefulness of the tracks; not the
10 Respondent's.

11 ADMINISTRATIVE LAW JUDGE MONTAQUE:

12 Mr. Vercruysse, did you have anything to add on the
13 safety issue?

14 MR. VERCRUYSSSE: If I might ask two questions
15 and then lead into the other safety issue or the
16 concerns, what train operations are currently
17 taking place over the tracks right now?

18 MS. ERBACHER: As of right now, my client has
19 one shipper on the line where they've brought in as
20 recently as June a boxcar -- one or two boxcars a
21 month. And they have to go through -- because of
22 Respondent's conduct, they've had to use the
23 runaround track. But that section, that yard, has
24 historically been used for switching of cars.

1 MR. VERCRUYSSSE: But currently this segment in
2 questions is not being utilized; the runaround is
3 being utilized?

4 MS. ERBACHER: Right. However, my client is
5 currently in contract negotiations where they will
6 have to use the switching yard because they will
7 have a larger volume of cars.

8 MR. VERCRUYSSSE: And this is with a separate
9 shipper or the same shipper?

10 MS. ERBACHER: Separate shipper.

11 MR. VERCRUYSSSE: What type of product is this
12 other shipper?

13 MS. ERBACHER: I believe this is car storage
14 that will be primarily holding hopper cars.

15 MR. VERCRUYSSSE: Hopper cars?

16 MS. ERBACHER: Large hopper cars.

17 MR. VERCRUYSSSE: Within our section, our track
18 section within the Illinois Commerce Commission
19 Rail Safety Section, we have inspectors that are
20 certified and jointly trained through the Federal
21 Railroad Administration. That is a different
22 segment.

23 Have you reached out to the Federal
24 Railroad Administration relative to their rules and

1 requirements for rail and track?

2 MS. ERBACHER: Yes, we have. We are an
3 FRA-accepted track. In addition to that, actually
4 FRA did come and inspect the tracks themselves.
5 They were actually the ones that initially alerted
6 us to this problem, alerted my client I should say.

7 MR. VERCRUYSSSE: Right. And the FRA inspectors
8 locally?

9 MS. ERBACHER: Yes.

10 MR. VERCRUYSSSE: What was their initial
11 assessment moving forward?

12 See, our inspectors who are certified or
13 qualified under the Federal Railroad Administration
14 are then tasked with writing defects or writing
15 items relative to the Code of Federal Regulations
16 for Rail Safety, not specifically within the
17 administrative code or the sections for the
18 Commerce Commission. So there are two different
19 segments through there.

20 I guess if greater rail activity or new
21 rail activity is to take place, then, yes, that
22 does constitute safety concerns if these are --
23 there hasn't been evidence or anything else
24 provided at this moment -- but then there are

1 concerns. But in terms of the commerce and the
2 track's safety standards, there could be complaints
3 and then they would be written up based on defects
4 and things of that sort.

5 The property right issue or whatever else,
6 I couldn't comment on.

7 MS. ERBACHER: And that is the issue, is that
8 because the tracks have been buried and damage
9 unique to the burial of the tracks, my
10 understanding from our professional engineer who
11 has investigated and from our conversations with
12 the FRA is that that means that the rock ballasts,
13 the drainage, and apparatus of the tracks are junk
14 and have to be replaced.

15 In addition to that, we have concerns of
16 the integrity of the rails themselves because heavy
17 earth-moving equipment has moved across them, which
18 has put a certain a type of stress on the rails
19 which has weakened their integrity.

20 If I may introduce Mr. Weiler Watson.

21 MR. WATSON: I was there when the FRA looked at
22 the initial thing.

23 MS. ERBACHER: Do I need to introduce him for
24 the reporter?

1 ADMINISTRATIVE LAW JUDGE MONTAQUE: Yes.

2 MR. WATSON: I'm Weiler Watson, W-e-i-l-e-r
3 W-a-t-s-o-n. I'm the operations manager for the
4 CLCY Railroad.

5 I was present with the FRA early in
6 February. The inspector's name was Tom Wozniak.
7 He's right here in Chicago, in Region 4. He was
8 out making a field inspection basically about our
9 motive power. And while he was walking with us
10 looking at our property, he pointed out that there
11 had been track that had been buried and it was
12 fresh. He was very concerned about that.

13 I asked about if I should file an incident
14 or accident report. I referred it to our legal
15 counsel who called Mr. Wozniak's boss. They said
16 no, because there were no injuries or loss of life
17 involved. That was the extent of their interest,
18 the FRA. Because there was no human factor and no
19 incident/accident, they felt it was a matter
20 referred out of their jurisdiction. Their only
21 component was was the railroad responsible for it
22 or was anyone hurt. No.

23 This appeared to be a trespass by an
24 outside force. They said, well, talk to your legal

1 department. They removed themselves from the
2 jurisdiction of it.

3 MR. SILVERMAN: When you are saying the tracks
4 are buried, are you talking about the spur track or
5 are you saying on your property?

6 MS. ERBACHER: I'm talking about the spur
7 track, which my client does have an easement to
8 use. And in addition to that, as a result of the
9 burying of the spur track, a landslide from rain
10 and precipitation has covered the main track, which
11 is directly adjacent to the spur track. That is
12 the track that my client owns in fee simple.

13 However, some of that dirt had been
14 removed by the conduct of the Respondents that I
15 discuss in the motion for preliminary injunction
16 where earth movers had removed dirt.

17 MR. SILVERMAN: I just want to make sure.
18 There is the spur track and there is the main
19 track. I don't think there is --

20 MS. ERBACHER: There is a runaround track next
21 to it.

22 MR. SILVERMAN: I'm sorry?

23 MS. ERBACHER: And then there is also a
24 runaround track next to it that my client currently

1 uses.

2 MR. WATSON: For brevity of the record, there
3 are four tracks that constitute our yard. Three
4 out of four are impacted. Only one is passable
5 now.

6 MR. SILVERMAN: If this is inappropriate, tell
7 me, but I don't have an understanding when they are
8 saying track is buried which track they are talking
9 about, which ones are operational. I would just
10 ask that the tracks be defined so that it is clear,
11 so we know. I don't know if you are intending to
12 say that the spur track is being utilized now and
13 that there are cars running over that or not. I
14 think it's unclear.

15 MS. ERBACHER: I will be more clear.

16 MR. SILVERMAN: I am not saying you're being
17 unclear. I'm just asking if someone could define
18 the four tracks and say which ones are being used
19 and which ones are not, it may help get to the
20 bottom line where you could make a determination.
21 I don't know. The runaround track, that's the
22 first time I've heard reference to that.

23 ADMINISTRATIVE LAW JUDGE MONTAQUE: Okay.
24 Well, still, again, based on what I'm hearing --

1 and I understand your citations to 7101,
2 Jurisdiction Over Rail Carriers, the other
3 provisions -- but, again, the statute
4 specifically -- where the Commission has authority,
5 the statute specifically empowers the Commission to
6 do certain things.

7 7502 is not one of those sections where
8 the Commission is actually empowered to do
9 anything. In fact, again, I mentioned the
10 penalties being misdemeanors and felonies, which
11 are criminal penalties. The Commission does not
12 have the authority to enforce those whatsoever.

13 So what does that mean going forward?

14 I understand you have a claim. If you
15 want, we can give this a continuance where you can
16 investigate further if you want to pursue this with
17 the Commission, but I am inclined to rule that the
18 Commission does not have jurisdiction. If you want
19 time to try to prove to me otherwise, I can do
20 that. I am sure time is of the essence. If you
21 want to take this and go to the Circuit Court,
22 obviously you are free to do whatever you'd like.

23 I just don't believe that the Commission
24 has the authority, unless, again, the safety of the

1 rail track, I mean that's something maybe that
2 might warrant an investigation. I don't know.

3 MR. VERCRUYSSSE: If I can clarify as far as our
4 relationship to the FRA and how our inspectors are
5 certified, most of our inspectors -- we have three
6 for the state. Two retire at the end of the month.
7 We will have one for the state. Usually they don't
8 come into the Chicago area. Usually they are out
9 on the large wide-open sections and in the other
10 yards. So the FRA personnel are usually the ones I
11 am dealing with, as you are, for these locations.

12 So the underlying item like they had noted
13 is if there is active track that you are running
14 over and they see a defect, they are going to go
15 towards the railroad to have it corrected.

16 I haven't had or seen a third party, well,
17 we have an issue that the rail was bent by this
18 company or this construction company when they came
19 through with a front-end loader and caught the
20 rail. I haven't seen where the Federal Railroad
21 Administration can write something against that
22 third party. They are going to say, railroad, you
23 need to fix it if you want to operate your cargo
24 over this location.

1 So I think that's what you had with
2 Mr. Wozniak. He said there is a concern here, but
3 we are stepping back, our jurisdiction is limited
4 to what you're running on currently.

5 But at a certain point, when the tracks
6 are or if they are reinstated and James Place is a
7 public highway crossing south of your location, at
8 that point then our jurisdiction for that highway
9 rail crossing comes in and then the FRA say are
10 these tracks now suitable, that's one of the steps.

11 As far as the damage and the possibility
12 of a third party damaging them, I'd have to concur.
13 It seems like it's better served first in the
14 Circuit Court. Then is the safety of these tracks
15 now sufficient within the codes of the Code of
16 Federal Regulations and then how we relate to that.

17 MS. ERBACHER: So then the only issue that
18 comes up with that is that when the Respondents
19 buried the spur track, they also installed a drain.
20 They installed a manhole. I can prove with a
21 survey and by pictures before and after that they
22 installed a totally new drainage system. That is
23 almost directly on top of the spur tracks.

24 MR. PORTER: Which is our property, which is

1 our property.

2 MS. ERBACHER: That we have a direct easement
3 over that is written on their deed.

4 MR. SILVERMAN: We strongly disagree with it.

5 MR. PORTER: It's a whole property issue which
6 I can't imagine you would get into.

7 ADMINISTRATIVE LAW JUDGE MONTAQUE: No, I
8 won't, not unless the statute gives us authority.
9 And I do not think -- I do not see that the
10 statutes have given -- the Legislature has given us
11 authority in this matter. I think those issues
12 would be more properly addressed in the Circuit
13 Court.

14 If it would expedite matters for you, I
15 can dismiss this for want of jurisdiction and you
16 can just go forward to the Circuit Court.

17 I don't see any issue here that we could
18 address for you. Even with the crossing, what we
19 typically do is we authorize certain types of
20 safety mechanisms and we require people to install
21 them or take them down. We don't have the type of
22 authority to enforce penalties and things of that
23 nature, especially those that are outlined here in
24 5/18c-7502.

1 I don't know how you want to proceed, but,
2 again, I am inclined to dismiss for lack of
3 jurisdiction.

4 MS. ERBACHER: Okay, your Honor.

5 ADMINISTRATIVE LAW JUDGE MONTAQUE: Is there
6 anything else you want to add?

7 MS. ERBACHER: Well, your Honor, at this point
8 if it's being dismissed for want of jurisdiction,
9 it would seem appropriate that this would have to
10 go through a criminal court since the penalties
11 that are imposed are felonies and whatnot.

12 ADMINISTRATIVE LAW JUDGE MONTAQUE: That's
13 interesting. I don't know the answer to that. I
14 don't know how you would jump to that. I don't
15 know if you'd go to the state's attorney or...

16 MR. PORTER: They would have to investigate.

17 MR. SILVERMAN: At the root of this dispute is
18 do you have an easement.

19 MS. ERBACHER: No. I believe the root of this
20 dispute is actually the amount of damages because
21 it is fairly clear that there is an easement.

22 MR. SILVERMAN: We have seen nothing to
23 establish an easement. The deed does not,
24 certainly as a matter of law does not.

1 If you have something else and you can
2 establish it, then it seems logical that you would
3 just show it to us, establish it, and then we don't
4 have to worry about -- it doesn't have to be in
5 dispute.

6 MS. ERBACHER: The documents that you are
7 referencing are your client's deed and your
8 client's certificate of title.

9 MR. PORTER: That does not create an easement.

10 MR. SILVERMAN: You need to look at it a little
11 more closely. We have some information that
12 suggests that there is no easement. No need to
13 burden the record with it, but we --

14 MR. VERCRUYSSSE: You are free to use the room.

15 MR. SILVERMAN: Which is a good idea. I'm a
16 fan of talking through and trying to figure out
17 where we have a fight and where we don't.

18 MR. PORTER: We would love to resolve the
19 problems.

20 ADMINISTRATIVE LAW JUDGE MONTAQUE: Well, I
21 think the Commission has done all it can do. So
22 that means I am going to dismiss this for lack of
23 jurisdiction. I wish you all luck in resolving the
24 matter.

1 MS. ERBACHER: Thank you, your Honor.

2 ADMINISTRATIVE LAW JUDGE MONTAQUE: But I think
3 that's all I can do for you today. Thank you.

4 (Which were all the proceedings
5 had in the above-entitled cause
6 this date and time.)

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1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF C O O K)

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5 WENDY A. KILLEN, being first duly sworn,
6 under oath says that she is a court reporter doing
7 business in the State of Illinois, and that she
8 reported in shorthand the proceedings of said
9 hearing, and that the foregoing is a true and
10 correct transcript of her shorthand notes so taken
11 as aforesaid, and contains the proceedings given at
12 said hearing.

13 IN WITNESS WHEREOF, I do hereunto set
14 my hand at Chicago, Illinois, this 8th of August,
15 2013.

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Certified Shorthand Reporter

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CSR Certificate No. 84-003772

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