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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

THE NAVAJO NATION, Plaintiff, vs. THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Defendants.	No. CV 11-08205-PCT-PGR REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The Federal Defendants hereby file this reply brief in further support of their Motion to Dismiss. Plaintiff has failed to identify a final agency action or unlawful inaction under the Administrative Procedure Act (APA). If this Court were to find that Plaintiff has identified an agency action or inaction that can be challenged under the APA, Plaintiff's claim is barred by the statute of limitations because it accrued in 1996, when Plaintiff became aware that NPS intended to follow the NAGPRA repatriation process. In addition, Plaintiff's takings claim must be dismissed because the Tucker Act provides a process for obtaining just compensation, and Plaintiff must avail itself of that process first. And finally, all the statutes and regulations indicate that in situations like this involving human remains and funerary objects, NAGPRA's provisions apply.

ARGUMENT

I. THERE HAS BEEN NO FINAL AGENCY ACTION OR UNLAWFUL INACTION UNDER THE APA.

Plaintiff argues that the NPS's actions in repatriating remains from CACH pursuant to NAGPRA "without the Nation's consent" rather than immediately returning them represent an "unlawfully withheld" final agency action. *See* Compl. ¶¶ 8, 63; Resp. to Defs.' Mot. to Dismiss ("Pl. Resp.") at 8. This is untenable, first, because NPS is in the midst of the repatriation process and its actions are not final. Second, even if these actions were considered final, Plaintiff's argument rests on a flawed interpretation of ARPA.

The "action" Plaintiff challenges is reviewable under the APA only if it constitutes "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Section 704 specifies that agency action is not final if the agency provides administrative process for addressing the given claim. 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (noting that agency action is not final for purposes of Section 704 until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule"); *Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) (noting the "jurisdictional nature of the administrative appeal requirement"). NAGPRA provides for an administrative process under which the agency will decide to whom remains should be repatriated. *See, e.g.*, 25 U.S.C. § 3005 (general repatriation process). This process has not yet

concluded; therefore there has not yet been a final agency action. *See Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F.Supp. 1397 (D. Hawaii 1995).

Further, to the extent Plaintiff challenges agency "inaction," this is also not reviewable because Plaintiff fails to assert the withholding of a discrete, nondiscretionary duty. The APA defines "agency action" to include failure to act, and thus allows for review of inaction under § 706(1). However, a "claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. SUWA*, 542 U.S. 55, 64 (2004) (emphasis in original); *Defs. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1099 (D. Ariz. 2009). To satisfy that standard, Plaintiff must identify a discrete agency action in 5 U.S.C. § 551(13) and demonstrate that the action is legally required. *SUWA*, 542 U.S. at 61–63. Section 706(1)'s "limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law." *Id*. at 65.

Plaintiff argues that 16 U.S.C. § 470dd creates a legally required duty to take discrete action. It does not. Plaintiff excerpts a section of this provision that suggests otherwise. Pl. Resp. at 9. But read as a whole—including the parts Plaintiff omitted—it is clear that 16 U.S.C. § 470dd creates no nondiscretionary duties applicable here. Instead, the section states that "[t]he Secretary of the Interior *may promulgate regulations* providing for . . . the ultimate disposition" of archaeological resources and "*[a]ny exchange or ultimate disposition* ***under such regulation*** of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands." 16 U.S.C. § 470dd (emphasis added). But no regulations have been promulgated under this section that address the "exchange or ultimate disposition" of such resources.[1]

Plaintiff argues that the Uniform Regulations are those that the Secretary passed pursuant to 16 U.S.C. § 470dd. Pl. Resp. at 8-9. But the Uniform Regulations do not address ultimate disposition of archaeological resources, and specifically state that the Secretary may promulgate such regulations addressing the ultimate disposition of archaeological resources.

[1] DOI is currently developing such regulations, and they will appear at 36 C.F.R. Part 79.

43 C.F.R. §7.13(c). Regulations governing custody of archaeological resources from Indian lands *generally* appear at 25 C.F.R. § 262.8. But these regulations explicitly except out remains, providing that "Ownership and right of control over the disposition of [remains and funerary objects] shall be in accordance with the order of priority provided in [NAGPRA]." 25 C.F.R. §262.8. Accordingly, the Secretary has not promulgated regulations addressing "the ultimate disposition" of archaeological resources under 16 U.S.C. § 470dd.

And even if regulations governing the ultimate disposition of remains had been promulgated, they would not apply here as there clearly has not yet an "ultimate disposition."[2] Therefore, this section is inapplicable and does not provide a "nondiscretionary" duty required for jurisdiction under the APA. As such, there has been no final agency action taken or withheld that can be reviewed under the APA.

II. PLAINTIFF'S CLAIMS WERE BROUGHT OUTSIDE THE STATUTE OF LIMITATIONS.

If this Court finds that there was a final agency action, however, Plaintiff's claims are barred because they were brought outside the applicable limitations period. Plaintiff has known that the United States intends to repatriate the remains pursuant to NAGPRA for more than six years and its claims are time-barred by 28 U.S.C. §2401(a).

Plaintiff argues it did not know that NPS was complying with NAGPRA's repatriation provisions instead of simply returning the remains to Plaintiff under their interpretation of ARPA until September 7, 2011.[3] Resp. at 9-10. However, as early as June 26, 1996, Plaintiff sent a letter to NPS objecting to the NAGPRA process and citing the Monument Act to argue it owned the remains from CACH, just as it does here. *See* Mattix

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[2] For this same reason, any injury to Plaintiff depends upon the remains being repatriated to another Tribe. Even if Plaintiff is correct in its interpretation of ARPA, Compl. ¶¶ 54–55, any injury based upon NPS's alleged noncompliance would not manifest until NPS "ultimate[ly] disposed" or repatriated the remains to someone other than the Plaintiff and/or did not consult Plaintiff in such a disposition. Thus the injury is speculative rather than certain, demonstrating lack of standing. *See* Mot. to Dismiss at 10-11. And for the same reason the case is not ripe; if the remains are repatriated to Plaintiff this suit will be moot. *See id*. at 11-12.

[3] To the extent that Plaintiff relies on the September 7, 2011, letter from NPS as final agency action under the APA, that argument must fail as the letter does not meet any of the categories identified at 5 U.S.C. § 551(13). *See SUWA*, 542 U.S. at 64.

Decl. (attached), Exh. 1.[4] The letter concludes that NPS "has no authority to treat these items other than as Navajo Nation property." NPS superintendent Anna Marie Fender replied to Plaintiff in an August 14, 1996, letter, explaining that pursuant to NAGPRA, NPS seeks to repatriate the remains under NAGPRA and is therefore undertaking consultation with tribes (1) from whose lands the remains originated *and* (2) that are, or are likely to be, culturally affiliated with the remains. *See* Mattix Decl., Exh. 2. The letter reiterates that NPS "will handle any requests for repatriation in strict accordance with the NAGPRA and its implementing regulations." *Id.*

A cause of action generally accrues when a plaintiff has knowledge of its injury. *Shiny Rock Mining Corp. v. U.S.*, 906 F.2d 1362, 1364 (9th Cir. 1990) (quoting *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986)). And "for purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the *consequences* of the acts [become] most painful.'" *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

This exchange shows that as early as 1996, Plaintiff was on notice that rather than simply returning remains originating from CACH, NPS intended to comply with the NAGPRA repatriation process—a process that involves repatriating based on cultural affiliation, rather than only property of origin. *See* Mot. to Dismiss at 4-5. Even if the *consequences* of this action were not manifested until later, Plaintiff nonetheless had sufficient knowledge to initiate a suit in 1996. For this reason, if the Court finds that there was final agency action, this suit is time barred under 28 U.S.C. §2401(a).

III. THIS COURT LACKS JURISDICTION TO HEAR PLAINTIFF'S TAKINGS CLAIM BECAUSE NO TAKING HAS YET OCCURRED.

Plaintiff argues that this Court has jurisdiction to hear Plaintiff's takings claim and to

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[4] When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider evidence outside of the complaint without converting the motion to dismiss into a motion for summary judgment. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988).

grant declaratory relief if it finds that an Act of Congress took Plaintiff's property interest in the remains at issue here. Because a suit for compensation could lie, no taking has yet occurred, and this Court lacks jurisdiction to hear this claim.

A "property owner has no claim against the Government for a taking" if the government "has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation." *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting *William Cty. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1995)). The Tucker Act, 28 U.S.C. § 1491, provides that the United States Court of Federal Claims has exclusive jurisdiction to hear any claim against the United States seeking damages in excess of $10,000 based on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. *See* 28 U.S.C. § 1491(a)(1). Takings claims against the federal government are thus "premature until the property owner has availed itself of the process provided by the Tucker Act." *Id.*

Plaintiff seeks a declaration that *if* the NAGPRA, ARPA or the Monument Act transferred title of the remains from Plaintiff to the United States, they are unconstitutional takings. Compl., Claim for Relief, ¶ e. Such relief was directly addressed and rejected in *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281 (9th Cir. 1997). In that case, the Ninth Circuit considered whether it could declare that a statute violated the takings clause, even though the Tucker Act provided an avenue for obtaining compensation for those whose property had been taken by operation of the statute. The court concluded that it could not do so because a compensation remedy is available through a Tucker Act claim. *Id.* at 1286 (citations omitted). In reaching this conclusion, the court acknowledged that Supreme Court precedent on the matter is inconsistent. *Id.* at 1286 n. 6. But the court relied upon the holdings of several clear cases, including *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986 (1984), that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016 (citation omitted). Consistent with this caselaw, in the view of the Ninth Circuit, declaring that an act of the government is

an uncompensated taking is a logical impossibility until the property owner has attempted to obtain compensation.

Plaintiff does not specifically address *Bay View*, but instead cites *Babbitt v. Youpee*, 519 U.S. 234 (1997) and *Hodel v. Irving*, 481 U.S. 704 (1987). These cases both concerned a provision of the Indian Land Consolidation Act (ILCA) that entirely eliminated Indian landowners' ability to leave fractional interests in property to their successors. In *Youpee*, plaintiffs sought to enjoin enforcement of ILCA, arguing that it violated the takings clause. The Supreme Court agreed and affirmed an injunction against enforcement of ILCA—without any discussion of how this relief interacted with the Tucker Act, and without any reference whatsoever to subject matter jurisdiction.

These cases are anomalous and distinguishable. Indeed, other courts have addressed these cases and recognized that "[t]hough the Supreme Court has granted declaratory and injunctive relief for a limited number of Takings Clause claims . . . it has also made clear that these cases are exceptional and limited to their facts. Those cases, moreover, involved regulatory takings, not physical takings." *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 19 n.10 (1st Cir. 2010), cert. denied, 131 S. Ct. 1600 (2011) (citing *Youpee* and *Hodel*); *Gordon v. Norton*, 322 F.3d 1213, 1216-17 (10th Cir. 2003) (addressing *E. Enters. v. Apfel*, 524 U.S. 498 (1998) and noting that *Eastern Enterprises* recognized that a Tucker Act remedy is available for physical takings). The Ninth Circuit recently affirmed that "a 'takings claim is premature until [plaintiffs] have availed themselves of the process provided by the Tucker Act." *In re N.S.A. Telecomms. Records Litig.*, 669 F.3d 928, 932-33 (9th Cir. 2011) (quoting *Bay View*, 105 F.3d at 1285) (collecting cases, noting agreement in nearly all Circuits on this point). The same result should apply here; and the persuasive logic in *Bay View* and the Supreme Court cases it relies upon should govern in this case, rather than the "exceptional" situation that existed in *Youpee*.

IV. NAGPRA, NOT ARPA, APPLIES TO THE REMAINS IN THIS CASE.

Contrary to Plaintiff's assertions, NAGPRA, not ARPA, controls here. NAGPRA was passed after ARPA, and addresses a narrow subset of the articles ARPA addresses. Indeed,

NAGPRA was passed to address circumstances just like those of this case. When read together, NAGPRA, ARPA, and their implementing regulations make clear that when there is an intersection, NAGPRA's specific procedures control over the general ARPA provisions.

A. NAGPRA is Applicable

NAGPRA is a more specific statute than ARPA, dealing specifically with disposition of human remains. It was also passed later in time. Both of these factors counsel in favor of an interpretation finding NAGPRA applicable here. *See FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.") (citations omitted); *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) (more specific statute controls).

All Department of the Interior (DOI) regulations indicate that NAGPRA provisions control over ARPA provisions. ARPA's regulations state that NAGPRA governs disposition of remains originating from NPS land. 43 C.F.R. §§ 7.3(a)(6), 7.13(e). After NAGPRA was passed, DOI amended the Uniform Regulations to provide "guidance to Federal land managers about the disposition of Native American human remains and other 'cultural items', as defined by NAGPRA." 60 Fed. R. 5256, 5256 (Jan. 26, 1995).[5] ARPA's uniform regulations explicitly reference NAGPRA and provide that NAGPRA controls:

> For the disposition following lawful removal or excavations of Native American human remains and "cultural items", as defined by the Native American Graves Protection and Repatriation Act (NAGPRA; Pub.L. 101–601; 104 Stat. 3050; 25 U.S.C. 3001–13), the Federal land manager is referred to NAGPRA and its implementing regulations.

43 C.F.R. § 7.3(a)(6). Thus the ARPA regulations contemplate disposition of remains occurring pursuant to NAGPRA—the more specific, more recently passed statute that speaks directly to disposition of remains such as those here.

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[5] NAGPRA applies to these remains whether the land is considered public land, Indian land, or a hybrid. *See* 25 U.S.C. § 3005 (stating that when items were in the possession and control of a Federal agency or museum prior to NAGPRA's passage, land ownership does not dictate entitlement to remains), 43 C.F.R. § 7.13(e) (defining "public lands" to include lands "administered by the United States as part of the national park system),

Plaintiff argues that the Bureau of Indian Affairs (BIA) regulations that confirm the application of NAGPRA to Indian lands do not apply to this case because the land is managed by NPS instead of the BIA. While Plaintiff is correct that these regulations provide guidance specifically to BIA officials, the regulations again show that every time it is addressed, NAGPRA controls over ARPA. It is also notable that this case presents an unusual situation where a federal land manager other than BIA is managing Indian land.

Further, Plaintiff cites the final rule amending the Uniform Regulations, but that document does not support Plaintiff's argument that using the NAGPRA process for resources from Indian lands was specifically rejected as violating ARPA. *See* Pl. Resp. at 3 (citing 60 Fed. Reg. at 5258). Instead, the Federal Register notice states that it uses "the term 'cultural items', as defined in NAGPRA, . . . to distinguish material remains that are to be treated under NAGPRA and its implementing regulations." 60 Fed. Reg. at 5257. Thus, the Federal Register notice's statement that "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources, and who, as stated in ARPA, determine the appropriate treatment" does not include NAGPRA cultural items. In fact, the preceding sentences explain that "[w]hen Native American human remains and other 'cultural items', as defined by NAGPRA, are returned to lineal descendants or culturally affiliated Indian tribes, then these items are no longer the responsibility of the United States," and the notice explicitly states that federal land managers are "referred to the requirements in NAGPRA and its implementing regulations." Consequently, the BIA regulations show that NAGPRA controls over ARPA. It would be anomalous, to say the least, for NAGPRA to control over ARPA in all cases except where the federal land manager over Indian land is someone other than the BIA.

If the Court finds ambiguity about which statute applies, however, DOI's interpretation should be given deference. *See U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001) (noting that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (citation omitted)); *see also*

Barnhart v Walton, 535 U.S. 212, 222 (2002) (noting "the interstitial nature of the legal question, the related expertise of the agency, the importance of the question to administration of the statute, the complexity of that administration and the careful consideration the agency has given the question over a long period of time").

B. NPS Properly has "Possession" or "Control" over the Remains.

Under the Monument Act, NPS is charged with "preservation" of ruins and other objects of "scientific or historical interest" at CACH. *See* 47 Stat. 2448 (the "Monument Act"), 16 U.S.C. § 445b (2006). This mandate requires exercising control over remains, removing them from CACH, and housing them elsewhere. Thus, NPS has legal possession and control over the remains at issue, sufficient to treat them as part of their collection. Therefore NAGPRA's "possession" and "control" provisions are not a bar to the Act's applicability here.

NAGPRA requires an agency to exercise "possession" or "control" over remains. 25 U.S.C. §§ 3003 (a), 3004 (a), and 3005 (a)(1) - (2). "The term 'possession' means having physical custody . . . with a sufficient legal interest to lawfully treat the objects as part of its collection . . . ." and "[t]he term 'control' means having a legal interest . . . sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection . . . ." 43 C.F.R. §§ 10.2(a)(3)(i) and (ii). Here, NPS has possession and control over the remains at issue.

NPS is explicitly charged with "preservation" and "maintenance" of the broad category of "prehistoric ruins or other features of scientific or historical interest within [CACH]." Indeed, one of the primary purposes of the Monument Act was to preserve the archaeological and historical items, such as remains, within CACH. *See* H.R. Rep. No. 71-2397, at 1 (1931). Preservation of these remains necessarily entails removing them from CACH because exposed human remains are at great risk due to erosion, wildlife and livestock tramping, and human visitation and illegal collection. And if remains are removed, they must be held in a collection of some kind. Here the remains are being held at the Western Archaeological Conservation Center ("WACC") in Tucson, Arizona.

This explicit mandate from Congress represents a sufficient "legal interest" for NPS to lawfully treat the remains at issue as part of its collection. NAGPRA, a statute specifically tailored to this circumstance, controls, and NPS properly has the "possession" and "control" over the objects to invoke it. NAGPRA thus applies.

V. OTHER TRIBES CANNOT BE JOINED WITHOUT THEIR CONSENT.

Plaintiff's complaint must also be dismissed because the Hopi, Zuni, and twenty-seven other potentially culturally affiliated Tribes participating in the NAGPRA process have an interest in the outcome of the process. Plaintiff's argument that the case should proceed because the United States could join tribes pursuant to FRCP 14 or 22 should be rejected because neither rule is appropriately applied in this situation and a ruling that the case could proceed would severely undercut tribal sovereign immunity.

Neither Rule 14 nor Rule 22 is appropriate here. Rule 14 allows a party to bring in a third-party defendant only if the third-party defendant "is or may be liable to [the original defendant] for all or part of the [original plaintiff's] claim against [the original defendant]." Impleader, therefore, can occur only in circumstances where, if the original plaintiff were to succeed on the claim that is already in the action, the original defendant will have a right to recover some or all of that liability from someone not yet a party. *U.S. v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983).

Here, even if Plaintiff were to prevail, the United States could not recover any liability from the other tribes. There is no right to seek contribution for violation of NAGPRA, and indeed Plaintiff does not even allege that it could recover contribution from the United States. Plaintiff's Complaint seeks declaratory and injunctive relief only. *See* Compl., Prayer for Relief. And the other tribes would not be liable to the United States. Those tribes are not wrongdoers, but are interested parties purely on the basis of their potential cultural affiliation with the remains. Rule 14 is simply inapplicable here.

Similarly, Rule 22(a)(2) should not apply, as it provides that "[a] defendant exposed to *similar liability* may seek interpleader through a crossclaim or counterclaim." (emphasis added). But, here, other tribes would not be "similarly" liable to the United States under

NAGPRA on the basis of their potential cultural affiliation, and the United States would not have a cross-claim or counterclaim to assert against other tribes. Interpleader under Rule 22, therefore, is not applicable here.

In *Peabody*, the Ninth Circuit held that the United States could be brought in to a suit through Rule 14, despite its sovereign immunity. *Peabody* involved a suit by the EEOC challenging a tribal preference provision in a coal mining lease held by Peabody. DOI required the lease provision at issue. The court held that the Secretary of the Interior was a required party who could not be joined because the EEOC could not file suit against the Secretary, but noted that if the EEOC prevailed against Peabody, Peabody could seek relief against the Secretary to prevent enforcement of the lease provision. *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1083-84 (9th Cir. 2010). Thus, the court allowed the case to proceed because Peabody could file a third-party complaint against the Secretary under Rule 14(a). The circumstances of the case at bar are quite different. NPS would have no right of recovery or claim against the other tribes, even were Plaintiff to prevail. And notably, *Peabody* did not address tribal sovereign immunity in the Rule 14 context. *Peabody* simply does not apply here.

Finally, if suits in which a tribe is a necessary party could proceed simply because the United States is also a party, then tribal sovereign immunity would be significantly curtailed. *See California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize."). Such a result would go against many years of Ninth Circuit caselaw holding that "a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Confederated Tribes of Chehalis v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (noting that U.S. cannot properly represent one tribe in intertribal conflicts without compromising trust obligations owed to all tribes).

CONCLUSION

For the foregoing reasons and for the reasons stated in Federal Defendants' Motion to Dismiss, the Federal Defendants request that this Court dismiss Plaintiff's Complaint.

Respectfully submitted this 21st day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012 I filed the foregoing REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

DATED this 21st day of May, 2012.

s/ Karmen Miller
Karmen Miller, Paralegal Specialist