

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

DOUGLAS J. LUCKERMAN
Plaintiff

v.

CA 13-185-S

NARRAGANSETT INDIAN TRIBE
Defendant

**AFFIDAVIT OF CHIEF SACHEM MATTHEW THOMAS IN SUPPORT OF
DEFENDANT NARRAGANSETT INDIAN TRIBE'S
MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) and 12(b)(7)**

Now comes Chief Sachem Matthew Thomas and after being sworn, hereby deposes and states:

1. I am the Chief Sachem of the Narragansett Indian Tribe and make this affidavit in good faith and except as otherwise indicated, on the basis of personal knowledge of the facts set forth herein.
2. The Narragansett Indian Tribe is a federally acknowledged and recognized tribe of Indians with inherent privileges and immunities. (48 Fed. Reg. 6177-78).
3. I have been the Chief Sachem of the Narragansett Indian Tribe since 1997.
4. I am familiar with the allegations in the above captioned action.
5. That I have reviewed the letter dated March 6, 2003 addressed to myself. (Attached as Exhibit 1 – Luckerman's letter of March 6, 2003)
6. That I have never executed or countersigned the letter dated March 6, 2003.
7. That neither the Tribe nor I have agreed to a waiver by the Narragansett Indian Tribe to "any defense of sovereign immunity solely for claims or actions arising from this Agreement that are brought in state or federal courts." (See. Exhibit 1).
8. Waivers of sovereign immunity are rarely authorized and only after significant deliberation by the Chief Sachem and Tribal Council.
9. That any waiver of the sovereign immunity of the Narragansett Indian Tribe requires the consent and resolution of the Narragansett Indian Tribal Council.

10. The Chief Sachem and the Tribal Secretary execute any Tribal Council resolution memorializing a waiver of immunity.
11. That I have reviewed the letter dated February 3, 2007 addressed to Mr. John Brown. (Attached as Exhibit 2- Luckerman's letter of February 3, 2007)
12. Mr. John Brown is the Narragansett Indian Tribal Historic Preservation Officer.
13. The Narragansett Indian Tribal Historic Preservation Office is a political subdivision of the Narragansett Indian Tribe.
14. The Narragansett Indian Tribal Historic Preservation Office is not authorized to waive or abrogate the Tribe's sovereign immunity.
15. No Tribal member, employee, entity or political subdivision is authorized to waive the immunity of the Narragansett Indian Tribe.

CHIEF SACHEM MATTHEW THOMAS

/s/ Chief Sachem Matthew Thomas

STATE OF RHODE ISLAND
COUNTY OF WASHINGTON

SUBSCRIBED and sworn before me this ____ day of July 2013.

/s/ John F. Killoy, Jr.

NOTARY PUBLIC
COMM. EXPIRES 7/29/13

DOUGLAS J. LUCKERMAN
Attorney at Law

20 Outlook Drive
Lexington, MA. 02421
(781) 861-6535
DLuckermanlaw@aol.com

March 6, 2003

Chief Sachem Matthew Thomas
Narragansett Indian Tribe
PO Box 268
Charlestown, Rhode Island 02813

Re: Agreement for Legal Services

Dear Chief Thomas:

Thank you for selecting me to represent the Narragansett Indian Tribe (Tribe). This letter confirms the discussion between you and the Law Office of Douglas J. Luckerman concerning his representation of the Narragansett Indian Tribe in connection with protecting the sovereign rights of the Narragansett Indian Tribe and assistance on other matters you may require on an ongoing basis.

I am aware of no conflicts or potential conflicts of interest between my representation of the Tribe and my representation of other clients that would preclude my representation here.

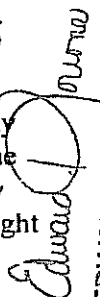
I will provide those legal services reasonably required to represent you, and take reasonable steps to keep you informed of progress and respond to your inquiries. You agree that I will not be required to take any action on your behalf that I do not consider appropriate in my professional judgment, regardless of whether another lawyer or law firm might exercise its judgment differently.

The hourly rate for my time will be \$225.00 per hour. The hourly rate for my associates is 150.00 per hour and my rate for paralegals and other employees is 125.00 per hour. I reserve the right to raise my hourly rates. I will notify you of any such increase at least thirty days before it becomes effective.

I will not charge the Tribe for costs and expenses incurred for in-office photocopying, long distance and local telephone calls, facsimile transmissions, ordinary postage, and local travel expenses. However, I will seek reimbursement of certain out-of-pocket costs and expenses, and the Tribe agrees to pay for these costs and expenses as I incur and bill them to you. These out-of-pocket costs and expenses commonly include express delivery fees (if such fees are incurred at your request, for your convenience, or as required for a particular matter), third party vendor photocopying and other reproduction costs, charges for computerized legal research, out-of-town travel expenses, extraordinary expenses incurred on your behalf, and other similar items. These costs and expenses will be billed to you at my cost.

If you should decide to discontinue the services of my law firm at any time you agree to notify me in writing of your decision and agree to be liable for any outstanding work time computed at the rates described above that are in effect at the time of the notice. I will send you statements at the end of every month in which I render services for the Tribe. The statements are due in full upon receipt. Past due amounts are subject to interest of 1.5 per cent per month and late fees. The Tribe agrees to waive any defense of sovereign immunity solely for claims or actions arising from this Agreement that are brought in state or federal courts.

TRUED BY TEST



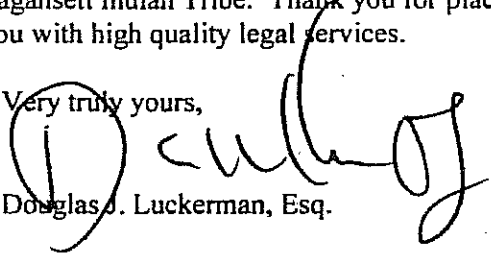
EDWARD MORRONE, CLERK
WASHINGTON COUNTY SUPERIOR COURT

I promise to keep you informed of all developments as they occur and to send you copies of all incoming and outgoing correspondence immediately after it is generated/received. I will personally manage all aspects of the matter you request that I address, preparing all necessary papers and documents.


I will make myself available, upon request, to attend Tribal Council meetings to answer questions or discuss the work I am doing for the Tribe. I will also be available by phone and email to answer questions from the Tribal Chief, Tribal Council and other members of the Tribe regarding the work I am doing for the Tribe.

I look forward to working with you and the Narragansett Indian Tribe. Thank you for placing your confidence in me. I look forward to providing you with high quality legal services.

Very truly yours,


Douglas J. Luckerman, Esq.

NOTE: THIS IS YOUR AGREEMENT. IT PROTECTS BOTH YOU AND YOUR ATTORNEY. IT IS DESIGNED TO PREVENT MISUNDERSTANDING. IF YOU DO NOT UNDERSTAND IT OR IF IT DOES NOT CONTAIN ALL THE AGREEMENTS WE DISCUSSED, PLEASE NOTIFY ME.

TRUE COPY ATTEST

EDWARD MORRONE, CLERK
WASHINGTON COUNTY SUPERIOR COURT

DOUGLAS J. LUCKERMAN
Attorney at Law

20 Outlook Drive
Lexington, MA. 02421
(781) 861-6535
(781) 652-8099 fax
DLuckermanlaw@aol.com

February, 3, 2007

Mr. John Brown
Narragansett Indian Tribal Historic Preservation Officer
Narragansett Indian Tribe
215 Fenner Hill Road
Hopkinton, Rhode Island 02832

Re: Contract Agreement and Payment of Past Due Funds

Dear Mr. Brown:

This letter confirms that you have engaged the Law Office of Douglas J. Luckerman to represent the Narragansett Indian Tribal Historic Preservation Office (NITHPO) in connection with issues that relate to the preservation of Tribal sovereignty, culture and traditions as well as for economic development and other issues you may choose in the future.

This letter, when accepted by you and returned to me, will constitute the agreement between us for me to represent the NITHPO.

I will provide those legal services reasonably required to represent you, and take reasonable steps to keep you informed of progress and respond to your inquiries. You agree that I will not be required to take any action on your behalf that I do not consider appropriate in my professional judgment, regardless of whether another lawyer or law firm might exercise its judgment differently.

The hourly rate for my time will be \$350.00 per hour. The rate for an Associate is \$225.00 per hour and the rate for a paralegal or other office time is \$125.00 per hour. I reserve the right to raise my hourly rates. I will notify you in writing of any such increase at least thirty days before it becomes effective.

I will not charge the Tribe for costs and expenses incurred for in-office photocopying, long distance and local telephone calls, facsimile transmissions, ordinary postage, and local travel expenses. However, I will seek reimbursement of certain out-of-pocket costs and expenses, and the NITHPO agrees to pay for these costs and expenses as I incur and bill them to you. These out-of-pocket costs and expenses commonly include express delivery fees (if such fees are incurred at your request, for your convenience, or as required for a particular matter), third party vendor photocopying and other reproduction costs, charges for computerized legal research, out-of-town travel expenses, extraordinary expenses incurred on your behalf, and other similar items. These costs and expenses will be billed to you at my cost.

If you should decide to discontinue my services at any time, you shall be liable for my time computed at the rates indicated above. The NITHPO agrees to a limited waiver of Tribal sovereign immunity in Tribal, federal and state courts, solely for claims arising under this Agreement. I will send you statements at the end of any month in which I render services for the NITHPO. The statements are due in full upon receipt. Outstanding funds are assessed an interest rate of 1.5 per cent per month.

I promise to keep you informed of all developments as they occur and to send you copies of all incoming and outgoing correspondence immediately after it generated/received. I will personally manage all aspects of the matter you request that I address, preparing all necessary papers and documents.

TRUE COPY TEST

Edward J. Morrone

EDWARD MORRONE, CLERK
WASHINGTON COUNTY SUPERIOR COURT

I will make myself available, upon request, to attend Tribal Council meetings to answer questions or discuss the work I am doing for the NITHPO. I will also be available by phone and email to answer questions from the Tribal Chief, Tribal Council and other members of the NITHPO regarding the work I am doing for the NITHPO.

ON GOING PAYMENTS

NITHPO agrees to establish an escrow account for legal fees related to work done in conjunction with, and in support of, NITHPO/EAC Capital Partners (EAC) economic development projects. Such escrow account shall be funded by economic development funds received from EAC/NITHPO economic development projects. This office and NITHPO will mutually agree on the selection of an escrow agent and thereafter, statements for work done on all EAC/NITHPO economic development projects will be tendered to the escrow agent for payment. Nothing in this Agreement precludes payment by NITHPO from sources other than the escrow account.

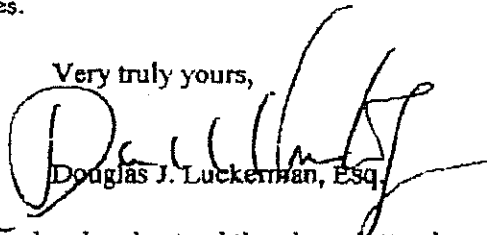
PAST DUE AMOUNTS

As of January 27, 2007, the NITHPO owes this Law Office \$87,133.25. (\$80,883.25 past due December 2006 plus \$6,250.00 for work in January 2007) The NITHPO agrees to pay this amount from funds received from Eugene Cam and EAC Capital Partners, either through a donation to the NITHPO arranged by Mr. Cam or from other economic development funds, within 30 days of executing this Agreement or as soon as the funds are received by the NITHPO. Any outstanding funds will be assessed an interest rate of 1.5 per cent per month.

I look forward to working with you and the NITHPO. Please signify the NITHPO's agreement with the above terms and conditions by signing and returning one copy of this letter to me either by fax or regular mail. Please retain one copy for you records.

Thank you for placing your confidence in me. I look forward to working with the NITHPO and to providing you with high quality legal services.

Very truly yours,



Douglas J. Luckeman, Esq.

I, John Brown, ^{NI Tribal} ~~Hist. Pres. Officer~~, have read and understand the above letter, have received a copy, and accept all of its terms:

Dated: 20 Feb 2007


John Brown, Narragansett Indian Tribal Historic Preservation Officer

NOTE: THIS IS YOUR AGREEMENT. IT PROTECTS BOTH YOU AND YOUR ATTORNEY. IT IS DESIGNED TO PREVENT MISUNDERSTANDING. IF YOU DO NOT UNDERSTAND IT OR IF IT DOES NOT CONTAIN ALL THE AGREEMENTS WE DISCUSSED, PLEASE NOTIFY ME.

COPY ATTEST

WARD MORRONE, CLERK
WASHINGTON COUNTY SUPERIOR COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN
Plaintiff

v.

CA 13-185-S

NARRAGANSETT INDIAN TRIBE
Defendant

DEFENDANT NARRAGANSETT INDIAN TRIBE'S
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

The Defendant Narragansett Indian Tribe (Tribe) hereby responds to Plaintiff Douglas J. Luckerman (Luckerman) memorandum in opposition the Tribe's motion to dismiss the within matter pursuant to Rule 12 (b)(1), (b)(6) and (b)(7) of the Fed.R.Civ.P. and motion to remand.

ARGUMENT

Luckerman's response to the Tribe's Motion to Dismiss is premised on two false assertions; that both the Tribe's sovereign immunity from unconsented suit and the Tribal exhaustion doctrines are inapplicable to this case. There can hardly be a case where they are more applicable than this one. This is an action for recovery of attorney's fees for services allegedly performed to protect Tribal sovereignty and promote Tribal economic development for the Narragansett Tribe by an out-of-state licensed attorney "knowledgeable in American Indian law." *See*, Luckerman's Affidavit at ¶ 2.

1. The Narragansett Indian Tribe Has Not Waived its Sovereign Immunity

Attorney Luckerman goes to great length to argue and distinguish this case from many other cases wherein the federal courts, including this Court and the First Circuit Court of Appeals, have long held that "Tribal immunity applies to governmental and

commercial activities, whether conducted on or off a reservation.” *Kiowa Tribe of Oklahoma v. Manufacturing Techs. Inc.*, 523 U.S. 751, 754-755 (1998); *see also*, *Maynard v. Narragansett Indian Tribe*, 798 F.Supp. 94 (D.R.I. 1992), *aff’d*, 984 F.2d 14 (1st Cir. 1993) (Tribal immunity applies to a civil suit for off-reservation activities.) and *Ninigret Development Co. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000). (Tribal immunity applies to a contract to be performed off-reservation by a Rhode Island incorporated non-Indian contractor.).

Luckerman argues that the 2003 and subsequent 2007 Agreements waive the Tribe’s sovereign immunity. *See*, Luckerman’s Memorandum pg. 14 to 21. The premise is that the waiver, or waivers, are clear and unambiguous. Luckerman goes to great lengths to say how this is so, thus it requires seven pages to explain. The First Circuit has long held that a waiver of tribal sovereign immunity must be unequivocally expressed. "It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’" *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 15 (1st Cir. 1993). *See also Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 58; *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (The Court dismissed a suit for attorneys fees on the basis of Tribal sovereign immunity.) and *Federico v. Capital Gaming International*, 888 F.Supp. 354, 356 (D.R.I. 1995)(Dismissed action for breach of contract.)

Relying upon *C&L Enterprises, Inc. v. Citizens Band Potawatomi Indian Tribe of Oklahoma*, gives little support to his waiver argument. 532 U.S. 411 (2001). “The Tribe offers no support for its argument that the waiver is ineffective because it is unsigned.” *See* Luckerman’s Memorandum at pg.15. *C & L Enterprises* involved an off reservation

commercial contract signed by both parties. *Id.* at 414. The case was not decided on whether the contract was indeed executed by the parties. The Supreme Court found that by entering into an explicit arbitration provision, which the Tribe had proposed and signed, the Tribe consented to a waiver its immunity. *Id.* at 423. *See Ninigret Development Co.*, 207 F.3d at 30. (Finding a waiver in an arbitration clause of a signed contract between the Tribe and a third party.)

Luckerman further argues that the Tribe waived its immunity through its course of conduct. *See* Luckerman's Memorandum pg. 16. This would require a waiver by implication, which is wholly contrary to the precedents of Supreme Court and of this Court. *See Frederico*, 888 F.Supp. 354 (D.R.I. 1995) (Court rejected plaintiff's arguments of waiver by conduct, including payments made under a contract.) and *Maynard*, 981 F. 2d at 16. (Waiver cannot be inferred.)

Luckerman's affidavit offers no support to his argument that the Tribe has explicitly waived its sovereign immunity. Noteworthy is that the affidavit fails to refute the Tribe's argument in its Memorandum in Support of its Motion to Dismiss which states that:

"As Luckerman well knows in his years of dealings with the Tribe (and other tribe's) waivers are not lightly granted in any transaction. Moreover, in the case of the Narragansett Tribe they require an explicit resolution of the Tribal government by a vote of the Tribal Council and the signature of the Chief Sachem." (*See* Tribe's Memorandum at pg. 5).

Tribal immunity precludes subject matter jurisdiction in an action against the Tribe. *Ninigret*, 32 F.Supp. at 502.

The Court thus lacks subject matter jurisdiction over the Tribe and the case must be dismissed pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil

Procedure

2. The Holding of *Narragansett Indian Tribe v. Rhode Island* Does Not Waive or Abrogate the Tribe's Immunity in this Contract Action

Luckerman's reliance on *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) is overstated. True and ironic is the statement that the case *Narragansett Indian Tribe v. Rhode Island* represents an "adverse impact" in the legal history of the Tribe's sovereign immunity. See Luckerman Memorandum pg. 19. Whatever the adverse impact that case may have upon the Tribe however is not applicable in a civil suit, by a private individual, for an alleged breach of contract.

As the First Circuit stated "we rest our decision squarely on the[se] idiosyncratic features" of the case at hand. *Id. at 22*. Those idiosyncratic features the Court in *Narragansett Indian Tribe v. Rhode Island* refers to involve the narrow interpretation of the relationship between the State of Rhode Island and the Tribe over the tax free sale of tobacco products and the enforcement of a criminal warrant upon the Tribe and its lands. Clearly not the case before the Court today.¹

The Supreme Court recently had to interpret whether a federal statute regarding prisoners rights waived a States right to sovereign immunity. The Court found the statute to be ambiguous and thus no waiver of immunity. The Court states that a "[w]aiver of immunity may not be implied[.]" Furthermore, "a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Sossamon v. Texas*, 563 U.S. ____ (2011), *slip op. p. 5*.

¹ "The Tribe's surrender of its right to sue for non-settlement lands neither says nor implies anything about a surrender of its immunity from suit relating to its territorial or extraterritorial actions." *Maynard* 984 F.2d at 16.

Luckerman is in essence asking this Court to overturn *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993), an action that the First Circuit refused to do in *Narragansett Indian Tribe v. Rhode Island*, which states that: “The facts of the *Maynard* case dictate that any holding there was necessarily limited to civil suits premised on activities occurring outside the settlement lands.” *Id.* at 29. The First Circuit in an *en banc* decision refused overturn to *Maynard v. Narragansett Indian Tribe*, which as stated above requires that any waiver of the Tribe’s sovereign immunity be explicit.²

Luckerman goes to great lengths to distance his activities from Tribal lands for purposes assumed to avoid Tribal Court jurisdiction. He states that his services were “performed largely in office and courthouses outside tribal land” and “my legal work for the Tribe was performed for the most part at my law office in Lexington, Massachusetts, and in federal courthouses in Providence and Boston.” *See* Luckerman’s Memorandum pg. 9 and Affidavit ¶¶ 4 and 6. The Supreme Court in *Kiowa* disagrees and has held that sovereign immunity applies to activities on or off the Tribal lands. Regardless of whether or not Tribal Court jurisdiction applies Luckerman’s own actions fall squarely under *Maynard*.

Further, the scope of any waiver of immunity found in *Narragansett Indian Tribe v. Rhode Island* must be strictly construed in favor of the Tribe. *Sossamon v. Texas*, 563 U.S. ____ (2011), *slip op.* p. 5.

The Court thus lacks subject matter jurisdiction over the Tribe and the case must be dismissed pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil

² Noteworthy is the fact that the First Circuit knows how to explicitly overrule its own decisions by expressly overruling *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005). *See, Narragansett Indian Tribe v. Rhode Island*, 449 F.3d at 25.

Procedure.

3. The Narragansett Indian Tribal Historic Preservation Office Lacks Authority to Waive the Tribe's Immunity

Luckerman seeks to bootstrap an alleged claim for relief and a waiver immunity by NITHPO upon the Tribe. If so, the absurd conclusion would be that any Tribal department, entity, or member is capable of waiving the governmental immunity of the Tribe *qua Tribe*. There is no basis for this conclusion either on the facts or in law. Waiver of sovereign immunity applies to the Tribe as a sovereign entity, not to individuals. *See generally, Cohen's Handbook of Federal Indian Law*, § 7.05[1][a].

Tribal sovereign immunity “rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance. The [authority] Tribal entity as an arm of the Tribe, enjoys the full extent of the Tribe's immunity.” *Ninigret*, 207 F.3d at 29 (*citations omitted*). In *Ninigret* a Tribal housing authority was sued for breach of contract. Just as here the contracting party to the February 3, 2007 Agreement was not the Tribe, but an entity of the Tribe. Whether NITPHO can waive its own sovereign immunity, as the Court found in *Ninigret*, is not at issue here because NITHPO is not a party to this action.

The power to waive Tribal sovereign immunity, like to power to legislate or carry out any of its governmental functions of the Tribe rests solely with the Tribal government.

A clear and concise reading of the February 2007 agreement cannot provide a factual basis that the Tribe consented to an explicit waiver of its immunity. The reading suggested by Luckerman is woefully ineffective to meet the high burden necessary to

find a waiver. The agreement state that “Luckerman will represent the NITHPO;” that the agreement is “between us for me to represent NITHPO;” that “NITHPO agrees to pay;” that “work I am doing for NITHPO;” that “NITHPO agrees to establish an escrow account;” and, “I look forward to working with NITHPO.”

Finally, that “NITHPO agrees to a limited waiver of Tribal sovereign immunity.” This is so not because the Tribe agreed to an agreement but because as the *Ninigret* court stated sovereign immunity extends to Tribal entities.

4. The Tribe Has Not Consented to a Waiver of Immunity In the Purported Agreements, By Resolution or Otherwise

Attached hereto and incorporated herein for purposes other than ruling upon the Tribe’s Rule 12(b)(6) motion is an Affidavit of Chief Sachem Mathew Thomas.

5. The NITHPO is an Indispensable Party Under R 12(b)(7)

As argued above, the Tribe has not waived its sovereign immunity thus claims against the Tribe must be dismissed. Claims against NITHPO, if any, require a direct action against it as an independent entity of the Tribe. *See, Ninigret.*

As Luckerman correctly points out a Rule 12(b)(7) motion will succeed (1) where there is an absent person without whom complete relief can be granted and (2) whose interest might be prejudiced in their absences. *See, Luckerman’s Memorandum* pg. 11. Clearly, absent a finding of waiver of immunity against the Tribe no relief can be granted in this action and any action against NITHPO in its absence would be prejudicial.

Whether or not NITHPO is subject to suit in this Court or whether Tribal exhaustion applies cannot be decided in this action.

CONCLUSION

For the compelling reasons set forth herein Plaintiff's Complaint
must be dismissed.

Respectfully submitted,

NARRAGANSETT INDIAN TRIBE

/s/ John F. Killoy, Jr.

John F. Killoy, Jr., Esq. (#3761)
Law Office of John F. Killoy, Jr., LLC
887 Boston Neck Road, Suite One
Narragansett, RI 02887
(401) 792-9090
j.killoy@verizon.net

CERTIFICATION

I hereby certify that I filed the within on the 13th day of May 2013, and that notice will be sent via the ECF system Notice of Electronic Filing (NEF) to the above-named counsel who are registered participants identified on the Mailing Information for Case No. 13-185-S.

/s/ John F. Killoy, Jr.

John F. Killoy, Jr., Esq. (#3761)