Judge Jones

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUDY ST. GERMAIN, MICHELLE ROBERTS, enrolled Nooksack Tribal members,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, Secretary of the Interior; KEVIN K. WASHBURN, Assistant Secretary of Indian Affairs; STANLEY SPEAKS, Northwest Regional Director; SCOTT AKIN, Acting Northwest Regional Director; JUDITH R. JOSEPH, Superintendent for the Puget Sound Agency,

Defendants.

CASE NO. C13-945RAJ

DEFENDANTS' MOTION FOR ORDER DETERMINING APPLICABLE STANDARD OF JUDICIAL REVIEW

(Note on Motion Calendar for: January 31, 2014.)

Pursuant to a stipulation of the parties, and the Court's approval thereof (*See,* Docket Ann. of 11/20/13), defendants United States Department of the Interior, Bureau of Indian Affairs, Sally Jewell, Kevin K. Washburn, Stanley Speaks, Scott Akin, and Judith R. Joseph, hereby move the Court for an order determining the applicable standard of judicial review for the causes of action asserted in the above-captioned lawsuit. Because, as set forth below, none of the claims or causes of action asserted by plaintiffs involve fact-finding, require discovery, or resolution by a trial on the

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merits, defendants additionally request that they be relieved of any obligation to provide initial disclosures, participate in a discovery conference, or prepare a discovery plan.

INTRODUCTION

In discussions concerning the Court's order requiring the parties to file a joint status report, a disagreement has arisen between the parties as to what standard of judicial review is applicable to the various claims asserted by plaintiffs in the operative complaint. Defendants' view, in a nutshell, is that the standard of judicial review applicable to all of plaintiffs' claims, with the exception of their FOIA claim, is the so-called "arbitrary and capricious" standard of review.[1] Plaintiffs believe differently. Because this dispute has consequences for both the preparation of the joint status report and the manner in which this lawsuit plays out before the Court, the instant motion was deemed necessary.

The *de novo* standard is the default for cases filed in federal courts not involving the federal government. When a case is before the Court for *de novo* adjudication, the parties gather evidence needed to support their claims and defenses by use of the various discovery tools made available to them under the Federal Rules of Civil Procedure. As contemplated by the Federal Rules, the parties first make required "initial disclosures," followed by a discovery conference and the preparation of a "discovery plan." See Rule 26(a)(1) and (f), F.R.Civ.P. Once the discovery plan is in place, discovery may proceed. If the case is not resolved by a dispositive motion or a settlement, expert witness and pretrial disclosures are required. Rule 26(a)(2) and (a)(3), F.R.Civ.P. The case proceeds to trial after a pretrial conference and relevant evidence is presented to the Court through the testimony of witnesses. Once the trial is completed and the case is submitted for a disposition, the Court finds facts based on the evidence, applies the law to those facts, and renders a final judgment.

A lawsuit adjudicated under the arbitrary and capricious standard of review proceeds in a very different manner. As distinguished from *de novo* adjudication, deference is very much a part of arbitrary and capricious review because cases in which that standard applies are brought to seek judicial review of the legality of exercises of agency discretion on matters delegated to them based

1 FOIA claims are handled in their own unique way, which is described *infra* in Argument section I.d.

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upon the agency's assessment of the facts and its obligations under the law. Ultimately, the focus of judicial review is not on the "wisdom" of the agency action *per se*, but whether the agency acted within the bounds of the law as disclosed by the administrative record. Thus, a claim to which the arbitrary and capricious standard of review is applicable proceeds through federal courts in a far different fashion. Indeed, the framework for judicial review under the arbitrary and capricious standard of review somewhat resembles the relationship between a U.S. District Court and the Courts of Appeals upon appellate review of a final judgment. The burden of fact finding and rendering a decision (formal or informal) based on the facts presented and the applicable legal standards are made in the first instance by the federal agency. If the agency decision is challenged, the agency creates a record, *i.e.*, an "administrative record" of its action for the District Court which forms the body of evidence upon which the Court bases its review. Because there is no evidence gathering or fact-finding associated with judicial review under the arbitrary and capricious standard, there is generally no trial *per se*, and no pretrial discovery. Such cases, if they are adjudicated on the merits, are always determined on the basis of a dispositive motion. Appropriate deference is given to the factual determinations of the administrative agency, and if its decision is not factually supported by the record, then the matter is ordinarily remanded for further proceedings. While the Court's review of legal questions is *de novo*, a range of deference is given to an agency's construction of ambiguous statutes which it is required to administer, and this is particularly so where administrative regulations have been promulgated.

So that they can know how to proceed, defendants request a determination from this Court whether plaintiffs' non-FOIA claims will proceed *de novo* or under the arbitrary and capricious standard of review. The parties' disagreement on this subject, which arose while attempting to prepare a joint status report, led directly to the request for leave to file this motion. Given the parties' differing views, a discovery conference and discovery planning would be a mostly fruitless endeavor. This is because, as noted above, arbitrary and capricious review is based upon an administrative record and, consequently, discovery is the judicially-allowed exception rather than the default rule and is based on a demonstrated need to "supplement" the administrative record for one

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of the four specific reasons recognized by the Court of Appeals. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1324 (D.C. Cir. 1984), *cert. denied*, 479 U.S. 923 (1986); *Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982); *and see, Doraiswamy v. Secretary of Labor,* 555 F.2d 832, 839-42 (D.C. Cir. 1976). For this reason, the Federal Rules of Civil Procedure automatically exempt such cases from the initial disclosure requirement and the discovery conference/discovery plan rules. Rule 26(b)(1), 26(f)(1), F.R.Civ.P.

As set forth below, defendants believe that the correct standard of review for all of plaintiffs' claims, except their FOIA claim (which, as discussed below, is handled uniquely), is the arbitrary and capricious standard of review.

ARGUMENT

I. PLAINTIFFS' NON-FOIA CLAIMS FALL UNDER THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

Plaintiffs' Amended Complaint, dkt # 3, alleges five separate causes of action. These five causes of action are as follows:

(1) Violation of the Indian Reorganization Act. Dkt. # 3, ¶¶ 84-90.

(2) Violation of the 5th and 15th Amendments. *Id.* ¶¶ 91-92.

(3) Violation of the Administrative Procedure Act. *Id.* ¶¶ 93-102.

(4) Violation of the Freedom of Information Act. *Id.* ¶¶ 103-104.

(5) Breach of Trust Duty. *Id.* ¶¶ 105-107.

All of these claims, except the FOIA claim, must be adjudicated under the arbitrary and capricious standard of review. The FOIA claim is adjudicated by a unique procedure which is discussed below.

a. Plaintiffs' Indian Reorganization Act Claim is Subject to the Arbitrary and Capricious Standard of Review

Plaintiffs allege that defendants violated the Indian Reorganization Act, 25 U.S.C. § 476, by failing to advise the Nooksack Indian Tribe in advance of the election that its proposed amendment is "contrary to applicable law." Dkt. # 3, ¶ 87. According to the allegations of the Complaint, the Secretary had an obligation to inform the Tribe that the proposed amendment violated the Indian

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Civil Rights Act, 25 U.S.C. §1302(a)(8), because it was "clearly motivated by racial animus against an identifiable group and protected class." *Id.* Plaintiffs' complaint also alleges that 25 U.S.C. § 476(d)(2) affords the District Court with subject matter jurisdiction to judicially review their claim that the Secretary acted illegally under this statutory authority. *Id.* at ¶ 22.

The fact that the District Court may have jurisdiction to review the legality of federal agency actions under a particular statute does not alone answer the pertinent question raised by this motion which concerns the applicable standard of review. The statute itself sheds no light on this question as it is devoid of any language setting forth any particular standard or procedure.[2]

Under these circumstances, where a statute like 25 U.S.C. § 476(d)(2) creates a remedy affording judicial review of agency action, but does not establish any particular standard for the review of that action, the APA's arbitrary and capricious standard of review is to be applied. *See, Doraiswamy v. Secretary of Labor,* 555 F.2d 832, 839-40 (D.C. Cir. 1976), *citing, United States v. Carlo Bianchi & Co.,* 373 U.S. 709, 715, (1963) ("in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, . . . consideration is to be confined to the administrative record and ... no *de novo* proceeding may be held"). Under this rule, plaintiffs' claim under 25 U.S.C. § 476(d)(2) is subject to the arbitrary and capricious standard of review.

b. Plaintiffs' Constitutional Claims are Reviewable under the Arbitrary and Capricious Standard of Review

Plaintiffs' operative complaint also alleges that defendants violated their rights to equal protection of the laws under the Fifth Amendment of the U.S. Constitution, and their right not to be

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2 25 U.S.C. § 476(d) provides, in pertinent part:

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. *Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.* (Emphasis added.)

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denied the right to vote based on race under the Fifteenth Amendment of the U.S. Constitution. While plaintiffs may hold those rights, they do not have a private right of action against the federal government directly under the Constitution. *Arpin v. Santa Clara Valley Transportation Agency,* 261 F.3d 912, 925 (9th Cir. 2001). A waiver of sovereign immunity which enables plaintiffs to sue the federal government in this Court for an alleged violation of those rights is necessary, and the APA is the only conceivable waiver of sovereign immunity for plaintiffs' constitutional claims. *See* 5 U.S.C. § 706(2)(B) (allowing review of agency action found to be "contrary to constitutional right"); 5 U.S.C. § 706(2)(D) (allowing review of agency action found to be "without observance of procedure required by law"). The APA also prescribes the applicable scope of review, which is arbitrary and capricious review based on the administrative record. 5 U.S.C. § 706(2).

c. By Definition, Plaintiffs' Claim that Defendants "Violated" the Administrative Procedure Act, Is Subject to Arbitrary and Capricious Review.

The third cause of action in plaintiffs' complaint alleges that defendants "violated" the Administrative Procedure Act in various ways. We take slight issue with plaintiffs' description of their third cause of action. The notion that the federal government can "violate" the judicial review provisions of the Administrative Procedure Act misconstrues the purpose of the statute. The APA is only a procedural statute which establishes a legal mechanism whereby perceived violations by federal agencies of substantive legal requirements found elsewhere can be brought before the Court for review and redress. *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991). Thus, a remediable "violation" by the federal government will always relate to some other substantive legal requirement rather than to the APA itself.

Plaintiffs' complaint expressly alleges that federal defendants have acted "arbitrarily and capriciously": (1) by "presiding over a federal election in which members of the Election Board are engaging in racially discriminatory election practices," in violation of the 5th and 15th Amendments to the U.S. Constitution, dkt. # 3, ¶ 94; (2) "by failing to inform the Tribe that the proposed amendment is contrary to the [Indian Civil Rights Act.]," in violation of the Indian Reorganization Act, *id.*, ¶ 95, 96; (3) by violating specific federal regulations pertaining to the election process, *id.*, ¶ 97; by taking actions in conflict with internal BIA manuals and handbooks, *id.*, ¶ 98; by violating

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provisions found in various identified international conventions; *id.* at ¶¶ 99-101; and by "giv[ing] authority and legitimacy to acts of a tribal government that are taken 'in derogation of the express language of the [tribe's] Constitution' and Bylaws," *id.* at ¶¶ 99-101.

Given how plaintiffs have framed their allegations, there would seem to be no reason to belabor the point. Because plaintiffs have alleged that these allegations are subject to review under the arbitrary and capricious standard of review, there appears to be no dispute between the parties as to the applicable standard of review for plaintiffs' third cause of action.

d. Plaintiffs' Fourth Cause of Action under the Freedom of Information Act is Adjudicated by a Unique Procedure which involves neither Discovery nor a Trial on the Merits.

Plaintiffs' fourth cause of action alleges a claim under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiffs allege that "Defendants' refusal and failure to provide the requested documents, and their current withholding of such documents, violates FOIA." Dkt. 3, ¶ 103. This cause of action is not covered by the APA's "arbitrary and capricious" standard of review because FOIA provides its own limited waiver of sovereign immunity. 5 U.S.C. § 552(a)(4)(B).[3] But, because of FOIA's unique nature, FOIA claims rarely involve discovery and are almost always resolved on the merits by a summary judgment motion in which the federal agency bears the burden of proof. See *Miscavige v. IRS*, 2 F.3d 366, 367 (11th Cir. 1993); *see also Summers v. Department of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (noting "peculiar nature of the FOIA").

As the Court knows, FOIA generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records, or portions thereof, are protected from disclosure by one of nine statutory exemptions or by one of three special law enforcement record exclusions. FOIA requests can be made for any reason whatsoever, with no

3 5 U.S.C. § 552(a)(4)(B) provides, in pertinent part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

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showing of relevancy required; because the purpose for which records are sought "has no bearing" upon the merits of the request, FOIA requesters do not have to explain or justify their requests. *United States Department of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989); *United States v. United States District Court, Central District of California*, 717 F.2d 478, 480 (9th Cir. 1983).

The ultimate issue in a FOIA action is whether the agency in question has "improperly" withheld agency records. 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). Whether an agency has "improperly" withheld records usually turns on whether one or more of FOIA's specifically enumerated statutory exemptions apply to the document at issue. *See United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (generalizing that "agency records which do not fall within one of the exemptions are improperly withheld").

What most significantly distinguishes a FOIA case from the typical lawsuit is that the very thing at stake, a withheld agency record, is also the very thing that a plaintiff would need in order to carry the burden of persuading a court of the merits of his or her position. Without access to a particular record, anything a plaintiff says about the lawfulness of the withholding of that record is nothing more than *ipse dixit*. Because of this phenomenon, the burden of proof is shifted to the agency, despite the fact that it is a defendant, to demonstrate the legality of its withholding. 5 U.S.C. § 552(a)(4)(B); *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 216 F.3d 1180, 1190 (D.C. Cir. 2000). Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved. *Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir. 1993). The agency has the burden of justifying nondisclosure and, generally, it is required to sustain its burden through the submission of detailed affidavits which identify the documents at issue and explain why they fall under the claimed exemptions. *See Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

As a further consequence of the unique nature of FOIA claims, discovery is rarely if ever necessary. As our Court of Appeals observed in *Lane v. Department of Interior,* 523 F.3d 1128 (9th Cir. 2008), "[w]hile ordinarily the discovery process grants each party access to evidence, in

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FOIA and Privacy Act cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents." *Id.* at 1134. To the same effect was the District Court's observation in *Stone v. Federal Bureau of Investigation*, 1988 WL 8850, (D.D.C. 1988), that:

> In contrast to the wide ranging discovery common in other types of lawsuits, discovery in a FOIA suit is circumscribed if available at all. Courts may, and often do, award summary judgment on the basis only of government affidavits that are relatively detailed, non conclusory, and submitted in good faith, as long as the plaintiff has no significant basis for questioning their reliability. *See, e.g., Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C.Cir.1980); *Goland v. CIA*, 607 F.2d 339, 352 55 (D.C.Cir.1978); *Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Commission*, 617 F.Supp. 825, 831 (D.D.C.1985). Where discovery is available, it is dedicated to countering government assertions of the completeness of a search or other statements in a summary judgment motion. *See, e.g., Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 181 (1975); *Military Audit Project v. Casey*, 656 F.2d 724, 738, 750-52 (D.C. Cir.1981); *National Cable Television Association, Inc. v. Federal Trade Commission*, 479 F.2d 183, 193 (D.C. Cir.1975).

Id. at * 1; *and see, Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions.").

Because nothing about plaintiffs' complaint reflects that this is the highly unusual case in which discovery is needed to support a FOIA claim, it is similar to a conventional arbitrary and capricious claim in that the Court should be able to resolve plaintiffs' claim without fact-finding and without any need for conventional discovery based on evidence supplied by the agency as to the nature of any documents withheld and the basis for the withholding. If this is the unusual case in which plaintiffs require some discovery to adjudicate their FOIA claim, they should be able to articulate that need in a motion.

e. Plaintiffs' Fifth Cause of Action Alleging a Breach of Defendants' Trust Obligation, if Viable, is also Subject to the Arbitrary and Capricious Standard of Review

Plaintiffs' fifth cause of action has two aspects. Plaintiffs' complaint alleges that defendants "have violated their trust responsibility to the Plaintiffs by authorizing a federal election clearly based on racial animus, to vote on an amendment to a tribal constitution that violates federal law, and in which racially discriminatory election practices are allowed to occur." Dkt. # 3, ¶ 106. The complaint also alleges that "Defendants have also breached their trust responsibility to Plaintiffs by refusing to comply with the Plaintiffs' FOIA request." *Id.* at ¶ 107.

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Defendants believe that neither of the two aspects of this cause of action states a viable claim for relief. An action for breach of trust must involve a trust "resource" which is "pervasively regulated" by the federal government. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (citing *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006)).[4] Insofar as nothing about this lawsuit involves mismanagement of a pervasively regulated trust resource, such as land or timber, plaintiffs' cause of action for breach of trust, which alleges that defendants have illegally conducted a Secretarial election, is unavailing.[5]

More to the point, even assuming that plaintiffs could state a claim for breach of a fiduciary obligation, that claim, like any claim for relief against the federal government, can only be brought pursuant to an applicable waiver of sovereign immunity. Because the APA provides the only conceivable statutory basis for plaintiffs' claim it follows that the APA also prescribes the applicable scope of judicial review, which is arbitrary and capricious review based on the agency's administrative record. 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party ...").[6]

4 In *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006), the Court, concluding that funding from the Department of Housing and Urban Development could not be considered a trust "resource" held that no fiduciary relationship existed between the Tribe and the United States in regard to such funds. In *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995), the Court found no trust duty because "[t]he off-reservation school was not a part of Indian lands, but was merely allocated by the BIA for use by the Tribes".

5 Plaintiffs' claim that a breach of a common law trust obligation arises from the manner in which defendants handled their FOIA request is deficient for an additional reason. No special rights are afforded to plaintiffs under FOIA by virtue of their status as enrolled members of the Nooksack Indian Tribe than they would have otherwise. Hence, there is no duty placed on the Government to take action beyond complying with general statutes and regulations applicable to everyone. *See, Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006); *and see, Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1309 (9th Cir.1997). Thus, there can be no separate cause of action for a breach of such obligation. *See Gros Ventre Tribe, supra*, 469 F.3d at 809 ("[T]he Tribes do not have a common law cause of action for breach of trust.")

6 The Court in *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) identified an "intra-circuit split of authority" as to whether district courts have subject matter jurisdiction in considering a breach of trust claim under the APA to adjudicate alleged breaches that do not involve "final agency actions" within the meaning of 5 U.S.C. 704. *Id*. at 808-809. The Court avoided this question, concluding that the plaintiffs in that case did not have a common law cause of action for breach of trust. *Id*. at 809. We do not believe that this unsettled question has an impact on the instant motion, but if the Court concludes differently, the problem can be avoided in a similar way. The Court could defer its ruling on the instant motion and direct defendants to file an appropriate motion to test the viability of this cause of action.

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CONCLUSION

For the foregoing reasons, defendants respectfully request that their motion be granted, that the Court order that the standard of review for all causes of action alleged in the complaint except plaintiffs' FOIA claim be adjudicated under the arbitrary and capricious standard of review, 5 U.S.C. § 706(2), and that the parties jointly prepare a schedule for the lodging of an administrative record, and the filing of cross-motions for summary judgment to bring the issues before the Court for adjudication on the merits.

DATED this 19th day of December 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on December 19, 2013, I electronically filed the forgoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

Anthony S. Broadman - anthony@galandabroadman.com

Ryan David Dreveskracht - ryan@galandabroadman.com

Gabriel S. Galanda - gabe@galandabroadman.com

I further certify that on December 19, 2013, I mailed by United States Postal Service the foregoing to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

-0-

Dated this 19th day of December 2013.

s/ Christine Leininger

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