UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MISSISSIPPI ADMINISTRATIVE SERVICE, INC., No. 3:14cv36 CWR FKB

Plaintiff,

v.

MISSISSIPPI BAND OF CHOCTAW INDIANS,
PHYLISS J. ANDERSON, in her official capacity,
CHOCTAW HEALTH CENTER,
CHOCTAW RESIDENTIAL CENTER,
CHOCTAW SHOPPING CENTER ENTERPRISE,
CHOCTAW ELECTRONICS ENTERPRISE,
CHOCTAW MANUFACTURING ENTERPRISE,
FIRST AMERICAN PLASTICS MOLDING ENTERPRISE,
FIRST AMERICAN PRINTING ENTERPRISE,
CHAHTA ENTERPRISE,
CHAHTA ENTERPRISE COMMERCIAL LAUNDRY,
CHOCTAW RESORT DEVELOPMENT ENTERPRISE,
PEARL RIVER RESORT,
SILVER STAR CASINO RESORT,
GOLDEN MOON CASINO RESORT,
CHOCTAW HOSPITALITY INSTITUTE,
CHOCTAW GOLF ENTERPRISE,
DANCING RABBIT GOLF CLUB,
CHOCTAW AUTOMOBILE ENTERPRISE,
AND JOHN DOES A-Z

Defendants

Removed from:

Circuit Court of
Hinds County, Mississippi
First Judicial District

Cause No. 13-800

JOINT NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendants Mississippi Band of Choctaw Indians ("Tribe"), Chief Phyliss J. Anderson, in her official capacity, Choctaw Health Center, Choctaw Residential Center, Choctaw Shopping Center Enterprise, Choctaw Manufacturing Enterprise, First American Plastics Molding Enterprise, First American Printing Enterprise, Chahta

Enterprise, Chahta Enterprise Commercial Laundry, Choctaw Resort Development Enterprise, Pearl River Resort, Silver Star Casino Resort, Golden Moon Casino Resort, Choctaw Hospitality Institute, Choctaw Golf Enterprise, Dancing Rabbit Golf Club, and Choctaw Automobile Enterprise (collectively, "Removing Defendants"),[1] by and through counsel, hereby remove the above-captioned civil action from the Circuit Court of Hinds County, Mississippi, First Judicial District, where it is docketed as Cause No. 13-800 ("State Court Action"), to the United States District Court for the Southern District of Mississippi, Jackson Division, the federal judicial district in which the State Court Action is pending, pursuant to 28 U.S.C. §§ 1331, 1441, and 1446. The federal question raised by the State Court Action is whether the Circuit Court, Hinds County, Mississippi may lawfully exercise jurisdiction over the contract claims filed against Defendants for breaches of contract which (if they occurred at all) occurred on Choctaw Indian Reservation lands. *Williams v. Lee*, 358 U.S. 217 (1959). Removing Defendants appear for the purpose of removal only and for no other purpose, reserving all defenses and rights available to them, and state as follows:

PARTIES

1. The Mississippi Band of Choctaw Indians is and at all times material was a federally recognized Indian tribe. *See United States v. John*, 437 U.S. 634, 647 (1978); 77 Fed. Reg. 47868, 47870: Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs (August 10, 2012). *See also* Complaint, attached hereto as Exhibit 1, at ¶ 2. The Tribe has joined in this notice of removal.

[1] As discussed herein at ¶ 3, the named Defendant Choctaw Electronics Enterprise no longer exists and is not a "properly joined and served" defendant under 28 U.S.C. § 1446(b)(2)(A) whose joinder or consent is needed for the other defendants to remove this action.

2. Chief Phyliss J. Anderson, sued in the State Court Action in her official capacity only, is the duly elected Chief of the Tribe. Ex. 1, ¶ 3. Since she is not a party to the contracts upon which the Plaintiff bases its cause of action, Chief Anderson is an improperly joined and a nominal defendant. Nonetheless, Chief Anderson has joined in the notice of removal.

3. Choctaw Electronics Enterprise ("CEE"), named as a defendant at Compl., ¶ 7, was formerly a joint venture 95% owned by the Tribe. As discussed in Exhibit 3, Affidavit of Melissa T. Carleton, at ¶ 5, it ceased operations long ago. CEE has not had any employees, assets or bank accounts for many years. CEE (the joint venture) did not exist as of the initiation of the State Court Action. CEE was not then an entity which could be subject to suit. Further, the Attorney General's office of the Tribe, upon whom the summons to CEE was delivered was not authorized to accept service for CEE. Hence, CEE has not been properly served, so CEE's consent to removal is not required. Further, since CEE was not a party to the contracts at issue in the Complaint, CEE would have been an improperly joined and a nominal defendant (even if it did exist, which it does not), so its failure to join in the notice of removal does not prevent removal. *See RICO v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007); *Farias v. Bexar Cty. Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 871-72 (5th Cir. 1991).

4. First American Plastics Molding Enterprise ("Plastics"), named as a party at Compl., ¶ 9, is a majority tribally owned joint venture, which has joined in this notice of removal. *See* Ex. 3 at ¶ 6. Since Plastics is not a party to the contracts upon which the Plaintiff bases its cause of action, Plastics is an improperly joined and a nominal defendant. Nonetheless, Plastics has joined in this notice of removal.

5. The remaining listed defendants in the State Court Action (Ex. 1 at ¶¶ 4-6, 8, 10-20) are unincorporated divisions or enterprises of the Tribe (*i.e.*, not separate legal entities from

the Tribe). Their consent to removal is not necessary since these remaining entities are not separate legal entities from the Tribe. Nevertheless, these defendants have joined in this notice of removal.

6. The contracts upon which the Plaintiff has sued (Exs. A-C to the Complaint) identify in their opening paragraph the Defendants listed at ¶¶ 4-20 of the Complaint as among the "tribal government services, programs, departments, enterprises" whose employees will be served by Plaintiff Mississippi Administrative Service, Inc., ("MAS") based on those contracts. The only party to those contracts (besides MAS) is the Mississippi Band of Choctaw Indians identified therein as the "Employer." As such, the Tribe is the only named defendant, if any, which can be liable on the contracts at issue. Moreover, those contracts expressly provide (under "General") that the "Employer has adopted an employee benefit plan to provide health benefits to qualified participants. Benefits to participants are provided by the benefit plan;" and, (under "Participant Eligibility") provide that "Employer shall have the authority to make final decisions on whether a participant is eligible to receive benefits." Under those contracts, the employees of the referenced "tribal government services, programs, departments, enterprises" only became eligible to benefit from Plaintiff's services to the extent the Tribe had control over and authority to approve those employees' participation in the tribal employee health benefit plan (and related tribal employee benefits) that MAS allegedly contracted to administer or support.

7. These contract documents are all referenced in the Complaint, ¶¶ 24-25, and attached thereto. Hence, the factual allegations in these contracts are a part of the factual allegations of the Complaint.[2]

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[2] *See Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 839 (5th Cir. 2004) (court may consider attachments to complaint as part of pleadings).

8. As set forth in the Complaint, Ex. 1 at ¶ 1, MAS is a corporation organized and existing under the laws of the State of Mississippi with its principal offices located in Brandon, Rankin County, Mississippi.

STATE COURT ACTION

9. The State Court Action was brought by MAS. All Removing Defendants (that is, all named Defendants except the Choctaw Electronics Enterprise) were served with a copy of the Summons and Complaint in the State Court Action on December 19, 2013. *See* Ex. 2 (copies of the summonses served upon Removing Defendants).

10. MAS alleges that it was injured by Defendants' breaches of certain purported contracts with MAS. As shown on the face of the Complaint, Ex. 1 at ¶¶ 22-24 (and per Exhibit D to the Complaint, incorporated therein at ¶ 30), the alleged breaches of contract were caused by the Tribe's discontinuance of MAS's tribal employee health benefit plan administrative services and the Tribe's decision to cease procuring certain other related tribal employee benefit services through MAS, all of which actions and decisions occurred on the Choctaw Indian Reservation. Ex. 3 at ¶ 7. This followed enactment of Choctaw Tribal Council Resolution CHO 12-122 (September 26, 2012) and actions taken by Chief Anderson in compliance therewith. That Resolution authorized and directed Chief Anderson to terminate the Tribe's own employee health benefit plan and transfer all tribal employees to various federal employee health benefit ("FEHB") plans as authorized by federal law at § 10221 of the Patient Protection and Affordable Care Act, P.L. 111-148. Section 10221 enacted S. 1790, a provision of which (now codified at 25 U.S.C. § 1647b) entitled Indian tribes which operate Indian Self-Determination Act contracts or compacts per 25 U.S.C. §§ 450 *et seq.*, 458aa *et seq.*, or 458aaa *et seq.*, to purchase and enroll their employees in FEHB plans. The Tribe is eligible to enroll its employees in FEHB plans per

those statutes and has done so. Ex. 3, ¶ 8. Adoption of that resolution eliminated the need for MAS services as regards administration of a tribal employee health benefits plan which no longer existed. Based on that Resolution, there was no tribal employee benefit plan for MAS to administer. A true and correct copy of that Resolution is attached hereto as Exhibit A to Exhibit 3 ("Ex. 3-A").

11. MAS alleges in the Complaint at ¶ 2 that the "principal place of business and governmental location" of the Tribe is in "Choctaw, Mississippi." "Choctaw, Mississippi" is the designated mailing address for the U.S. Postal Service postal unit administered by the Mississippi Band of Choctaw Indians on the Choctaw Indian Reservation. Ex. 3, ¶ 9. In the Complaint, Ex. 1 at ¶ 30, MAS also references and attaches a Choctaw Attorney General's letter of November 8, 2012 (marked as Exhibit D to the Complaint). That letter states, *inter alia*:

> Further, the only court that could lawfully exercise jurisdiction over any disputes arising from the Tribe's dealings respecting MAS is the Choctaw Tribal Court. The controlling federal case law makes clear that state courts may not exercise subject matter jurisdiction to adjudicate disputes between private parties and Indian tribes involving causes of action based on alleged breaches of contract or torts grounded in actions or inactions of the Tribe occurring on its reservation lands. This prohibition on state court jurisdiction is a controlling rule of federal law and is not alterable by consent of the parties. *Williams v. Lee*, 358 U.S. 217 (1959); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984) (*Wold I*); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986) (*Wold II*); *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971).

(Emphasis added).

12. Resolution CHO 12-122 was duly enacted at a Choctaw Tribal Council meeting on September 26, 2012. That meeting occurred and the resolution was adopted at the Choctaw Tribal Council Hall on Choctaw Indian Reservation lands at the tribal headquarters in the Pearl River Community, Choctaw, Mississippi. Ex. 3, ¶ 7. Likewise, the Tribe's decision to cease

using MAS to provide other services for its tribal employees was also made on the reservation. *Id.*

13. The Complaint (supplemented by the incorporated statement in the Exhibit D letter) thus makes clear that the conduct of the Defendants which MAS claims constitutes a breach of contract occurred on Choctaw Indian Reservation lands. *See United States v. John*, 437 U.S. 634 (1978) (Mississippi Choctaw trust lands were declared to be Indian reservation land per 9 F.R. 14904 (December 23, 1944) and to constitute "Indian Country"). *See also* § 1(a) Pub. L. 106-228, 114 Stat. 462, Act of June 29, 2000:

> Notwithstanding any other provision of law—(1) all lands taken in trust by the United States for the benefit of the Mississippi Band of Choctaw Indians on or after December 23, 1944, shall be part of the Mississippi Choctaw Indian Reservation.

14. As discussed further below, because all events (the alleged breaches of contract) giving rise to MAS's cause of action are the result of actions of Defendants which took place on Choctaw Indian Reservation lands, MAS's claims may not be adjudicated in any state court in any action filed by MAS. This includes the Circuit Court for Hinds County, Mississippi. That court is not a "court of competent jurisdiction" to hear this claim.

BASIS FOR REMOVAL – FEDERAL QUESTION (28 U.S.C. § 1331)

15. Under 28 U.S.C. § 1441(a), "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed ... to the district court of the United States for the district and division embracing the place where such action is pending." Under the grant of federal question jurisdiction, "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Federal question jurisdiction exists where either the claims pled "necessarily raise a federal issue" or the

claims "are completely preempted by federal law." *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008). Both situations apply here to grant jurisdiction in this Court over MAS's action.

I. Contested and Substantial Question of Federal Law

16. In its Complaint at ¶¶ 22 and 24, MAS claims that the State court has jurisdiction over Defendants and the subject matter of MAS's breach of contract claims based on the contract clause there set out:

> "GOVERNING LAW
>
> This Agreement is entered into and shall be governed by, and construed in accordance with, the laws of the State of Mississippi, and any dispute shall be adjudicated by a court of competent jurisdiction in Jackson, Hinds County, Mississippi unless such laws are pre-empted by applicable federal laws or jurisdiction." (Emphasis added).
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> *See* page 4, Exhibit "A" to the Complaint.

Ex. 1, ¶ 24 (emphasis added).[3] *See also id.* at ¶ 25 (referring to similar language in other purported contracts).

17. Although Removing Defendants deny the validity of the contracts overall, the federal question "necessarily raise[d]" by MAS's action is whether the Circuit Court of Hinds County, Mississippi, regardless of the language in the contract, may lawfully exercise jurisdiction over MAS's claim against Removing Defendants based on alleged breaches of contract which, if they occurred at all, occurred based on the actions taken by or on behalf of Removing Defendants on the Mississippi Choctaw Indian Reservation. MAS's contention that

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[3] Jurisdiction is based on the allegations in the plaintiff's complaint. *See Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311, 1316 n.8 (5th Cir. 1994) (quoting *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) ("whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed"), *cert. denied*, 450 U.S. 949 (1981)). Defendants do not waive any defenses they may have as to the allegations in the complaint by virtue of this removal petition.

jurisdiction is proper in the Hinds County Circuit Court, Ex. 1 at ¶ 22, squarely presents a contested and substantial issue of federal law and makes the action appropriate for removal under 28 U.S.C. § 1441(a). *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

18. Federal authority to allocate jurisdiction in Indian Country stems from the Indian Commerce Clause of the U.S. Constitution. Const. art. I, § 8, cl. 3. The Indian Commerce Clause divests the states of "virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1966).

19. Congress has established a process by which States may acquire jurisdiction over civil actions arising in Indian County against Indian defendants. *See* Act of Aug. 15, 1953, 67 Stat. 588 (repealed and reenacted 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. § 1321-26, and 28 U.S.C. § 1360) (commonly referred to as "Public Law 280"). Mississippi could have obtained jurisdiction over the Choctaw Indian reservation per that statute, but has not done so. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 42 and fn. 16 (1989) ("The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280"); *Tubby v. State*, 327 So. 2d 272, 285-88 (Miss. 1976) (finding that Mississippi had not acquired jurisdiction over the Mississippi Choctaw reservation per PL 83-280). To acquire Public Law 280 jurisdiction, Mississippi would have to complete each of the following steps:

- Take state legislative action to acquire jurisdiction over civil actions arising in Indian Country against Indians. *See* 25 U.S.C. § 1322; *Kennerly v. District Court*, 400 U.S. 423 (1971).

- Based on the 1968 amendments enacted as part of Pub. L. 90-284, obtain the consent of the Tribe through a Secretarial election in which a majority of voting tribal members approves the State's acquisition of jurisdiction. *See* 25 U.S.C. §§ 1322, 1326; *Kennerly*, 400 U.S. at 428.

Until and unless Mississippi satisfies each of these requirements, its courts cannot exercise civil adjudicatory jurisdiction over Mississippi Choctaw parties for causes of action seeking relief against them based on their actions or inactions on Choctaw Indian Reservation lands. State courts are not "courts of competent jurisdiction" for such actions.

20. Additionally, under federal common law,[4] the State cannot exercise jurisdiction over civil actions against Indian defendants arising in their Indian Country absent specific Congressional authorization. *Williams v. Lee*, 358 U.S. at 217-18, 221-22 (holding that federal law prohibits state courts from exercising jurisdiction over civil actions involving claims against Indian defendants arising in their Indian country in the absence of a "Governing Act of Congress" expressly authorizing the State to exercise such jurisdiction).

21. Further, in *Kennerly*, 400 U.S. at 427-29, the Supreme Court held that no tribal government could, by unilateral tribal council action, alter the *Williams v. Lee* bar to exercise of state court jurisdiction where the State had not itself acted to acquire that jurisdiction per Public Law 280, as discussed above. Thus, even if the contract clause quoted in the Complaint at ¶ 24 had been duly approved by the Choctaw Tribal Council, and were construed to reflect tribal intent to have the Hinds County Circuit Court hear claims filed *against the Tribe* arising from that contract, that contract clause would not have been legally effective to authorize that result.

22. Moreover, that contract clause does not evidence tribal agreement to have suits filed against the Tribe involving alleged tribal breaches of contract based on the Tribe's on-reservation actions or inactions adjudicated in the Hinds County Circuit Court. Instead, at most, the clause only obligates that Circuit Court forum to be used in circumstances when it could be "a court of competent jurisdiction" and if the exercise of that jurisdiction was not otherwise

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[4] The federal question giving rise to federal court jurisdiction may be one of federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972).

"preempted by applicable federal laws or jurisdiction." For the reasons herein set out, no state court can be a "court of competent jurisdiction" over claims pled against the Tribe, tribal entities, or tribal officials or members sued for actions they took on the Choctaw reservation. Thus, the clause at most permits suits in a state court located in Hinds County, Mississippi, wherein the Tribe is the plaintiff. *See Wold Engineering*, *supra.*

23. MAS's Complaint contains a contested and substantial issue of federal law, namely: whether the Circuit Court of Hinds County, Mississippi, may lawfully exercise jurisdiction over MAS's contract action against the Tribe arising from alleged contract breaches by the Tribe which (if they occurred at all) occurred on Choctaw Indian Reservation lands, *i.e.*, in the Tribe's "Indian Country." The action is thus appropriate for removal under 28 U.S.C. § 1441(a). The question whether a State court can lawfully exercise jurisdiction over a claim filed against a tribal defendant based on that defendant's actions or inactions occurring on its Indian reservation lands, or whether exercise of State court jurisdiction over such cases is barred by *Williams v. Lee*, *supra*, is a federal question which will support removal or original jurisdiction in a United States District Court per 28 U.S.C. § 1331. *See Pueblo of Santa Ana v. Nash*, 2013 WL 5366403 (D.N.M.) (original jurisdiction); *Luckerman v. Narragansett Indian Tribe*, 2013 WL 4616084 (D.R.I.) (removal jurisdiction); *Muhammad v. Comanche Nation Casino*, 742 F.Supp.2d 1268 (W.D. Ok. 2010) (removal jurisdiction); *Tohono O'Odham Nation v. Schwartz*, 837 F.Supp. 1024 (D. Az. 1993) (original jurisdiction).

II. Complete Preemption

24. Removal is also appropriate under 25 U.S.C. § 1441(a) because the Indian Commerce Clause, Public Law 280, and federal common law (the *Williams v. Lee* rule) completely preempt the determination as to whether and how a state has or can acquire civil

jurisdiction over Indian Country. This is strictly a question of federal law. As in *Oneida Indian Nation v. Oneida County*, 414 U.S. 661 (1974), wherein the Supreme Court found a state-law property claim against an Indian tribe completely preempted, the federal common law now protects Indians and Indian tribes from state civil jurisdiction over actions involving claims against them arising from their actions or inactions in their Indian Country. *See id.* at 677. MAS's action is, therefore completely preempted and removal is proper.

REMOVAL PROCESS

25. As noted above, each Removing Defendant was served with the summons and complaint on December 19, 2013. Exhibit 2. Because this Notice of Removal is being filed within thirty (30) days after service of the earliest date that any of the properly joined and served Defendants was served with the summons and complaint, it is timely filed under 28 U.S.C. § 1446(b).

26. Apart from the Summonses and Complaint, *see* Exs. 1-2, the Removing Defendants have received no other process, pleadings, motions or orders. *See* 28 U.S.C. § 1446(a).

27. For the foregoing reasons, this Court has removal jurisdiction over this civil action. The United States District Court for the Southern District of Mississippi, Jackson Division, is the federal district embracing the Circuit Court of Hinds County, Mississippi, where the Complaint was originally filed. *See* 28 U.S.C. § 104(b)(1). Accordingly, the civil action may be removed from the Circuit Court of Hinds County, Mississippi, First Judicial District, and brought before the United States District Court for the Southern District of Mississippi pursuant to 28 U.S.C. §§ 1331, 1441, and 1446.

28. Written notice of the filing of this Notice of Removal will be served upon MAS's counsel, and a copy of the Notice of Removal promptly filed with the Clerk of the Circuit Court of Hinds County, State of Mississippi, as required by 28 U.S.C. § 1446(d).

29. Pursuant to 28 U.S.C. § 1446(a) and Local Rule 5(b), attached hereto as Exhibit 4 is a certified copy of the entire state court record. In accordance with Section 3.B.2 of this Court's Administrative Procedures for Electronic Case Filing, Removing Defendants will also, within fourteen (14) days of this removal, file electronically with this Court this certified copy of the Hinds County Circuit Court record.

30. All Removing Defendants are filing this Notice of Removal through their counsel, and therefore consent to the removal of this action to this Court, subject to and without waiving any defenses and rights available to them.

WHEREFORE, Removing Defendants remove this action to this Court and invoke this Court's jurisdiction.

DATED this 16th day of January, 2014.

Respectfully submitted,

MISSISSIPPI BAND OF CHOCTAW INDIANS, PHYLISS J. ANDERSON, in her official capacity, CHOCTAW HEALTH CENTER, CHOCTAW RESIDENTIAL CENTER, CHOCTAW SHOPPING CENTER ENTERPRISE, CHOCTAW MANUFACTURING ENTERPRISE, FIRST AMERICAN PLASTICS MOLDING ENTERPRISE, FIRST AMERICAN PRINTING ENTERPRISE, CHAHTA ENTERPRISE, CHAHTA ENTERPRISE COMMERCIAL LAUNDRY, CHOCTAW RESORT DEVELOPMENT ENTERPRISE, PEARL RIVER RESORT, SILVER STAR CASINO RESORT, GOLDEN MOON CASINO RESORT, CHOCTAW HOSPITALITY INSTITUTE, CHOCTAW GOLF ENTERPRISE, DANCING

RABBIT GOLF CLUB, and CHOCTAW AUTOMOBILE ENTERPRISE

By: C. Bryant Rogers

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CERTIFICATE OF SERVICE

I, Charles E. Ross, one of the attorneys for Defendants, do hereby certify that I have this day mailed by first class United States Mail, postage prepaid, a true and correct copy of the above document to:

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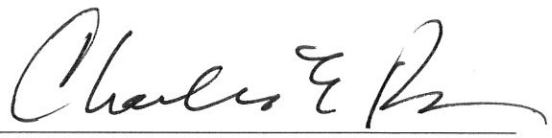
This the 16th day of January, 2014.



CHARLES E. ROSS