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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

Grand Canyon Trust, *et al*.,

Plaintiffs,

v.

Michael Williams, Forest Supervisor, Kaibab National Forest, *et al*.,

Defendants,

Energy Fuels Resources (USA) Inc., *et al*.,

Defendant-Intervenors.

No. CV13-08045 PCT-DGC

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

(Assigned to The Honorable David G. Campbell)

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Defendant-Intervenors Energy Fuels Resources (USA) Inc. and EFR Arizona Strip LLC (together "EFR") hereby file their Reply Memorandum in Support of their Motion for Summary Judgment, and incorporate the U.S. Forest Service ("USFS") reply herein.

I. The VER Determination Does Not Trigger NEPA or NHPA (Claims 1 & 2).

A. The VER Determination is not an approval or a license.

As EFR previously explained, the crux of Claims 1 and 2 is Plaintiffs' assertion that the Withdrawal mandated the VER Determination,[1] making it an approval or license. EFR Br. at 3-7 (Doc. 147-1).[2] That theory is not supported by the language of the Withdrawal, or the law regarding mining claims and withdrawals. *Id*. The language of the Withdrawal only prohibits "location and entry"[3] under the Mining Law; it does not prohibit mining on existing claims. EFR Br. at 4 & n.7. There is nothing in the Withdrawal mandating any action, including checking the validity of mining claims. Further, Plaintiffs' asserted mandate is not implied by the "subject to valid existing rights" language. As EFR explained, such language means that the prohibition in the Withdrawal is subservient to any valid existing rights. *Id*. at 4 n.8 (citing *Alaska v. Thorson*, 83 IBLA 237 (1984)). *Alaska* states that the effect of a withdrawal subject to valid existing rights is that such rights are "not extinguished." 83 IBLA at 250.[4] Thus, contrary to Plaintiffs' arguments (Pl. R. at 14), the effect of the "location and entry" prohibition is prospective. *In re Coates-Lahusen*, 69 IBLA 137, 142 (1982); AM. LAW OF MINING, 2D ED. § 14.04 (through a withdrawal, "the government has prohibited the initiation of new claims").

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[1] EFR uses the term VER Determination (Plaintiffs' term) for consistency in briefing, but that term is misleading. The so-called "VER Determination" is merely a report from a mineral examination, and does not, nor is it intended to, officially determine anything, as the Court previously concluded. Preliminary Injunction ("PI") Order at 10-12 (Doc. 86); *see also* USFS Reply.

[2] Plaintiffs' claim that EFR does not disagree with this point (Plaintiffs' Reply at 12 (Pl. R.) (Doc. 151) is absurd. EFR focused half of its first brief on the issue. EFR Br. at 3-7.

[3] Expanding on the explanation of those terms from EFR's first brief, "entry" most formally means the issuance of a final receipt (*i.e*., First Half of Final Certificate) in the patent process. Informally, entry has been used as synonymous with location (although in the case of a formal land order like the Withdrawal, such redundancy is not the likely intent). AM. LAW OF MINING, 2D ED. §§ 30.02, 51.10; *see Wilbur v. United States*, 280 U.S. 306, 315 (1930).

[4] Plaintiffs do not address *Alaska* on reply or refute its control over this issue.

The phrase "valid existing rights" is not synonymous with "valid mining claim," as Plaintiffs would have it. Location of a claim and filing it in the land records give rise to property rights (such as equitable and possessory rights) that may be less than those that accompany a valid mining claim (*i.e.*, a claim with a discovery), but nevertheless are protected and can only be extinguished through due process (*i.e.*, a claim contest). *Cameron v. United States*, 252 U.S. 450, 459-461 (1920); *Alaska, supra*; *In re Wilson*, 35 IBLA 349, 352-54 (1978) ("The purpose of the 'subject to valid existing rights' clause is merely to express [DOI's] recognition that established property rights are to be deferred to at the execution of the withdrawal. A valid location gives a claimant established rights"); AM. LAW OF MINING, 2D ED. § 14.04 (same). In *Davis v. Nelson*, the Ninth Circuit stated that properly located mining claims create valid existing rights (such as equitable and possessory rights) that "cast a cloud" on the United States' title to the lands they embrace. 329 F.2d 840, 845-46 (9th Cir. 1964). This is because a mining claim is a claim of a property right to use and exploit the land, recorded in the land records. That cloud cannot be removed merely by public land order, but must be removed by the United States (should it choose to do so) in a claim contest, which is an administrative proceedings akin to a quiet title action. *Id.*[5] Further, just as in property law, there is no requirement that the United States seek to remove the cloud. *See United States v. Rice*, 1989 WL 112460, at *8-9 (9th Cir. Sept. 15, 1989) (BLM and USFS have total discretion as to if and when they investigate mining claims and initiate claim contests). The phrase "subject to valid existing rights" means that the Withdrawal's prohibition is subservient to all existing rights at the time of the Withdrawal, even those that are lesser than the rights that accompany a verified valid mining claim.[6]

Finding no support from the Withdrawal, Plaintiffs cite out-of-context quotes from the preamble to BLM's 3809 regulations for the assertion that the Withdrawal mandated

[5] USFS policy is consistent with *Davis*. ARDoc. 371:7280 ("A mining claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by [DOI] or Federal courts.").

[6] The forgoing makes clear that Plaintiffs' argument about having to rewrite the "subject to valid existing rights" language is wrong, as well as their argument that such language would be without effect if read consistent with EFR's explanation. Pl. R. at 13-14 & n.10.

the VER Determination. Pl. R. at 12-14 (quoting from 65 Fed. Reg. 69,998, 70,025 & 70,026 (Nov. 21, 2000)). The quotes are from BLM's discussion of 43 C.F.R. § 3809.100(a), which only mandates a VER determination *before BLM will approve a new plan of operations in a withdrawal area*.[7] The preamble and the regulation do not mandate VER determinations in any other circumstance or speak to the effect of withdrawals.[8] The arguments based on these quotes are wrong. Similarly, Plaintiffs ask the Court to "put aside" the distinction between the agencies' treatment of existing claims with approved plans of operation in withdrawn areas (like the Mine), and existing claims in such areas for which a plan of operation is sought. Pl. R. at 12. This factual distinction is crucial for determining whether 3809.100(a) or related FSM § 2803.5 applies. It cannot be "put aside." EFR Br. at 5. This Court agreed. PI Order at 11 n.2.[9] Plaintiffs try to avoid this result by claiming that USFS did a VER determination in this case, and thus, rejected the interpretation it now offers. Pl. R. at 13. That does not follow; USFS can conduct a VER determination for any reason. *Rice*, *supra*; *Martinek*, 166 IBLA at 352.

Plaintiffs also claim that because the VER Determination was not part of a claim contest, it must have been required by the Withdrawal. Pl. R. at 15. That is a *non sequitur*, and wrong. VER determinations are investigatory tools used to determine whether to *later* bring claim contests, not the other way around. PI Order at 10-12; Motion to Dismiss ("MTD") Order at 9-10 (Doc. 131); EFR Br. at 7; ARDoc 331:5901. Further, VER determinations do not change from investigatory tools to approvals based on context. ARDoc. 359:6783, 6806; AM. LAW OF MINING, 2D ED. § 50.03[3].

In sum, the Withdrawal did not mandate the VER Determination. A VER determination is an investigatory tool with no legal effect. Thus, it is not an approval or

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[7] The block quote from the preamble at Pl. R. at 12 has no relevance to when VER determinations are performed. The citation to *United States v. Martinek*, 166 IBLA 347 (2005), says nothing about withdrawals mandating VER determinations. *Id.* at 354-58.

[8] Section 3809.100(a) does not reflect some mandatory requirement that BLM conduct VER determinations before allowing any mining in a withdrawn area. It is a codification of the agencies' enforcement policy under the Mining Law. 65 Fed. Reg. at 70,026.

[9] Thus, Plaintiffs' analogy of Vane Minerals to EFR also is wrong. Pl. R. at 14. Consistent with FSM § 2803.5 and 3809.100(a), USFS required VER determinations for Vane's claims within the Withdrawal area *because* Vane submitted applications for new plans of operations. *Yount v. Salazar*, 2013 WL 93372, at *9 (D. Ariz. Jan 8, 2013).

license that triggers NEPA or NHPA compliance. PI Order at 10-12; MTD Order at 9-10; EFR Br. at 7. Plaintiffs' NHPA arguments do not change this result. Pl. R. at 21-25. Even assuming the resumption of mining operations is an "undertaking" as Plaintiffs incorrectly suggest, USFS does not have Section 106 consultation duties unless that activity requires a federal license or approval. *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755-56 (D.C. Cir. 1995).[10] As EFR has shown, the VER Determination is not a license or an approval.

B. The VER Determination is a nondiscretionary act.

Plaintiffs argue that the VER Determination is discretionary because USFS had discretion in gathering and evaluating costs (including environmental compliance costs). That argument was rejected in *In re Konsake Sand Corp*. 12 IBLA 288, 286-99 (1973) (recognizing some discretion in the process of calculating costs (including environmental compliance costs), but holding that the determination of a discovery is nondiscretionary (and does not trigger NEPA));[11] *see infra* note 21. Plaintiffs' cases are not to the contrary. They state that environmental compliance costs must be considered in a VER determination, *In re Great Basin Mine Watch*, 146 IBLA 248, 256 (1998), and discuss the Interior Secretary's discretion to review (and re-review) a patent application (including the mineral examination) before a patent issues. *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 508-09 (9th Cir. 1997); *Barrick Goldstrike Mines Inc. v. Babbitt*, 1994 WL 836324, at *4-6 (D. Nev. 1994). They do not speak to the issue of whether a mineral examination is discretionary.[12] Thus, Plaintiffs' renewed claim that *Independence* overruled *Wilderness Society v. Robertson*, 824 F. Supp. 947 (D. Mont. 1993) is wrong.

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[10] *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 759-60 (D.C. Cir. 2003) (following *Sheridan*). *Fowler* prompted the Advisory Council on Historic Preservation to amend its Section 106 program to conform therewith. 69 Fed. Reg. 40,544, 40,550 (July 6, 2004).

[11] Plaintiffs' argument also was rejected in *Nat'l Ass'n of Homebuilders v. EPA*, 551 U.S. 644, 668-73 (2007). EFR Br. at 8-9. Plaintiffs did not address *NAHB* on reply or refute its control over this issue.

[12] Plaintiffs' citation to *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360 (1989), is misplaced. That case addresses when to supplement a NEPA analysis. The citation to *CBD v. NHSTA*, 538 F.3d 1172 (9th Cir. 2008), also is misplaced. There, the statute at issue provided NHSTA authority to impose higher standards based on impacts learned from a NEPA analysis; the Mining Law provides no such latitude. *Kosanke, supra*.

Pl. R. at 151 at 18; Doc. 63 at 14. This Court rejected that argument when it relied on *Wilderness Society* and should do so again. PI Order at 12; MTD Order at 9-10. *Independence* addressed whether the issuance of a patent is ministerial. 105 F.3d at 508. The court concluded that the Secretary does not have a ministerial duty to issue a patent prior to making his/her own final determination that all of the Mining Law's patent requirements have been met, including a discovery (the court called this determination the Secretary's "validity determination" – not to be confused with a mineral examination alone). *Id*. at 507-09. *Independence* does not address whether a mineral examination is nondiscretionary (or triggers NEPA), the question presented in *Wilderness Society*.

II. Assuming It Was Triggered, USFS Properly Applied § 800.13(b)(3) (Claim 3).

Plaintiffs do not address EFR's argument that 36 C.F.R. § 800.13(b) was not triggered because the designation of Red Butte as a TCP was not a "discovery." EFR Br. at 9-10. Instead, they agree with EFR, Pl. R. at 26, but still conclude that 800.13(b)(1) applies. Doc. 140-1 at 35. That is contrary to the plain terms of 800.13(b), which requires a discovery for any of the section to apply. Claim 3 should be rejected.

Assuming 800.13(b) was triggered, USFS did not err in applying 800.13(b)(3). Aside from one argument noted below, on summary judgment, Plaintiffs do not present any arguments the Court has not rejected. PI Order 14-17.[13] Plaintiffs have given the Court no reason to change course. EFR Br. at 10-12.[14] The only new argument is Plaintiffs' claim that USFS has not "approved the undertaking," as required for 800.13(b)(3) to apply. Pl. R. at 26. That is contrary to Plaintiffs' Amended Complaint and the record, both of which identify the relevant *approved undertaking* as USFS's approval of EFR's plan of operations ("Plan"). Doc. 115 ¶ 85; ARDoc. 553:10601-603. USFS's determination regarding the approved undertaking is controlling unless arbitrary and capricious. Doc. 146-1 at 9.

[13] The Court's conclusion that the unambiguous language of 800.13(b)(3) controls, and its rejection of Plaintiffs' regulatory history and deference to Advisory Council for Historic Preservation interpretations arguments are well founded. *See, e.g.*, *Wards Cove Packing Corp. v. NMFS*, 307 F.3d 1214, 1219 (9th Cir. 2002).

[14] Plaintiffs' suggestion that 800.13(b)(3) is an emergency procedure to protect historic properties is only half correct. It also protects projects. ARDoc. 533:10603.

Finally, Plaintiffs' extra-complaint claim that USFS did not complete consultation under 800.13(b)(3) properly should be rejected. Pl. R. 28-29. As EFR detailed in response, EFR Br. at 12, and USFS's reply, USFS provided the Havasupai more process and consideration than 800.13(b)(3) requires or envisions.

III. USFS's VER Determination Is Not Arbitrary and Capricious (Claim 4).

If the Court finds that the VER Determination is not mandated by the Withdrawal it need not address Claim 4 because the outcome will have no impact on any party. In any event, Plaintiffs ask this Court to hold that the VER Determination was arbitrary and capricious because they have set forth (in some cases completely speculative) cost categories at the Mine for which they cannot find a line item in USFS's mineral exam. As detailed by USFS on reply, courts defer to agencies as to what level and specificity of evidence is necessary to support their analyses and decisions. *Lands Council v. McNair*, 537 F.3d 981, 992 (9th Cir. 2008). For mineral examinations, that level (and the overall level of detail) is dictated by the amount of resources at issue. ARDoc. 374:7436 (when resource values are high, it is not necessary to delineate in detail minor costs). Examiners also may rely on cost estimates from nearby, similar mining operations to verify costs. *Id*. Here, at USFS's direction, EFR (expert miners who have mined similar projects, such as the nearby Arizona 1 Mine) prepared conservative costs to mine, mill, and market in compliance with all laws and the Plan. USFS independently verified those costs. EFR Br. at 13-14. In so doing, it also verified those costs against the costs EFR experienced at Arizona 1. ARDoc. 525:10500. EFR notes, however, that the VER Determination, as well as its Appendix C and the Excel document referred to in the Roberts Declaration (Doc. 147-2),[15] do not contain the level of specificity Plaintiffs seek. Therefore, EFR provided the Roberts Declaration to explain that the applicable costs noted by Plaintiffs

[15] Contrary to Plaintiffs' position, Appendix C and the Excel document were before USFS when it made its decision (and thus in the record), but Plaintiffs failed to inform the Court that the parties agreed to keep those documents out of the public record because they contain confidential business information. Plaintiffs' request for their disclosure now should be rejected due to that agreement, and because they do not provide the information Plaintiffs seek. The documents are available for *in camera* review upon request.

were included in the analysis provided to USFS, and where they were included[16] (despite specificity not being required by USFS).[17] Faced with a mine with very high value resources (*i.e.*, $29.3 million in profit), USFS was not arbitrary and capricious.

Assuming USFS failed to account for Plaintiffs' costs as alleged, the error would be harmless because it would not change USFS's conclusion that the claims were valid. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986). USFS found that the profit at the Mine is $29.3 million. EFR Br. at 13. Conservatively adjusted for inflation, the cost of monitoring and conservation measures is estimated at $393,180. *Id.* at 14. Even if those costs were ten times that amount, USFS's conclusions would not have changed. Plaintiffs have not made any attempt to demonstrate otherwise, as is their burden. *Cal. Wilderness Coal. v. Dep't of Energy,* 631 F.3d 1072, 1091 (9th Cir. 2011).

IV. Plaintiffs Have Not Established Standing for Claims 1, 2, and 4.

When this case started, Plaintiffs did not state a personal interest in, or allege harm related to, the VER Determination. EFR Br. at 1-2. On reply, two declarants filed "supplements" to add such personal interests and injuries.[18] Standing must exist at the commencement of a case and not be made up later; the supplements should be rejected. *Skaff v. Meridien N. Am. Beverley Hills, LLC*, 506 F.3d 832, 838 n.5 (9th Cir. 2007); *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999). Without them, Plaintiffs have no injury in fact traceable to the VER Determination.[19] Further, Plaintiffs cannot show that the NEPA or NHPA processes for the VER Determination *could* protect their procedural interests, as they must. *NRDC v. Jewell*, 749 F.3d 776, 783 (9th Cir.

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[16] USFS need not include in the record raw data behind documents it reviews and relies upon if it did not rely on such data for its decisions. *Common Sense Salmon Recovery v. Evans*, 217 F. Supp. 2d 17, 22 (D.D.C. 2002).

[17] The Court can consider this extra-record evidence because it explains a technical issue, and is provided by a person involved in the preparation of the document at issue. *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993).

[18] The declarants simply added language to previous declarations to now claim an interest in the VER Determination. *Compare* Doc. 37-8 ¶¶ 10-11 *with* Doc. 151-2 ¶¶ 10-12.

[19] The Havasupai declarants did not file supplements. Their declarations do not mention an interest in or injury related to the VER Determination. They do not have standing for Claim 2. EFR Br. at 2 & n.3. Plaintiffs' claim that the challenged action in Claim 2 is a failure to act (and not the VER Determination) is contrary to their focus on the VER Determination – the alleged trigger for any NHPA obligations. Doc. 115 ¶¶ 79-83; Pl. R. at 2, 3, 21-23.

2014). Plaintiffs' injuries are tied to mining, which is authorized and controlled by EFR's Plan, not the VER Determination. 36 C.F.R. §§ 228.4, 228.5; PI Order at 10-12 (a VER determination has no legal effect); MTD Order at 9-10 (Doc. 131) (same). Thus, any NEPA and NHPA processes for the VER Determination could not change the Plan, and thus, mining operations.[20] They have not shown causation or redressability.[21]

V. Claims 2 and 3 are Barred by Collateral Estoppel.

Plaintiffs argue that the Court's prior ruling on USFS's claim preclusion argument makes collateral estoppel (issue preclusion) inapplicable. Pl. R. at 20-21. Unlike claim preclusion, issue preclusion applies even "in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Plaintiffs also argue that the issue here was not previously litigated because this case involves a different claim than in *Havasupai Tribe v. United States*. Pl. R. at 20. Plaintiffs' NHPA claims here are based on whether USFS consulted with the Havasupai regarding Red Butte and considered the impacts thereon. Doc. 115 ¶¶ 79-88; Doc. 140-1 at 28-40. That issue was litigated and decided in *Havasupai*. 752 F. Supp. 1471, 1486-88, 1493-1500 (D. Ariz. 1990). These issues are the "same" under the test in *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995). The evidence is the same record regarding USFS's consultation and decision on the Plan,[22] and the argument is the same–failure to consult and consider impacts to Red Butte. While this case involves an NHPA claim and *Havasupai* involved a NEPA claim, these statutes require essentially the same procedures and considerations. *Te-Moak Tribe*

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[20] Plaintiffs' reliance on *Alliance for the Wild Rockies v. USDA* is misplaced. There, the court found that USFS's NEPA compliance for a bison management plan could protect plaintiffs' interests in grizzly bears because the plan *authorized and controlled* the bison hazing activities that impacted the bears, *and* the plan and hazing activities *might be changed* during that process. 772 F.3d 592, 599 (9th Cir. 2014).

[21] Plaintiffs' suggestion (Pl. R. at 4) that NEPA and NHPA processes could cause USFS to reach a different validity conclusion is wrong. The Mining Law does not compel compliance with other laws in order to definitively determine mining costs; it requires a reasonable estimate of costs based on known circumstances at the time of a mineral exam. *E.g.*, ARDoc. 374:7429, 7436; *see United States v. Coleman*, 390 U.S. 599, 602 (1968); *Kosanke*, 12 IBLA at 286-99 (NEPA is not required when processing a VER determination (even for informational purposes). Further, the argument that such processes could result in USFS requiring conservation measures or precluding mining was rejected in *Kosanke*. 12 IBLA at 286-99.

[22] ARDocs 1-257: 001-5287. The additional evidence is USFS's consultation with the Tribe about Red Butte and the Mine since *Havasupai*. *See, e.g.*, ARDoc. 666:12387-389.

of W. Shoshone v. Dep't of Interior, 608 F.3d 592, 607 (9th Cir. 2010); 36 C.F.R. §§ 800.8(a), (c) (authorizing and urging agencies to merge NEPA and NHPA compliance). Trial preparation in *Havasupai* covered the same matters presented here because the claims in each case are so closely related. *Te-Moak*, *supra.* Plaintiffs had a "full and fair opportunity" to litigate this issue, *Taylor*, *supra*; ARDoc. 50:1754. They are foreclosed from doing so again, particularly when the project has not changed. ARDoc. 443:8611.

VI. An Injunction Is Not Appropriate; Briefing on Remedy Should Be Allowed.

Regardless of the outcome of the case, EFR's Plan will remain valid, and is the sole approval necessary from USFS to conduct mining operations, and as EFR has made clear, its mining claims remain valid until invalided through a claim contest. An injunction is not appropriate. If the Court is inclined to consider some form of injunctive relief, EFR joins USFS in urging the Court to order briefing: no party has addressed the issue fully; and, contrary to Plaintiffs' assertions (Pl. R. at 30), EFR has commenced preparations to be able to restart active mining (*i.e.*, shaft sinking) at the Mine in mid-April/early May 2015. Being able to restart the Mine at that time is critical to EFR's overall business plan, which depends on this work for: 1) the retention of its skilled crew (currently at EFR's Pinenut Mine until it is mined out in early to mid-April 2015, and then moving to the Canyon Mine); 2) meeting EFR's planned production schedule; 3) the planned operation of EFR's White Mesa Mill (and employee retention at that facility); and, 4) meeting future (2016 and 2017) revenue projections, that if not met would severely limit EFR's ability to maintain cash flows sufficient for ongoing operations. Decl. of Harold Roberts ¶¶ 6-11 (Jan. 29, 2015). In preparation for the restart, since December 2014, EFR has spent or committed $575,000 for capital equipment to perform upgrades at the Mine, as well as for other operational equipment. *Id*. ¶ 12.

VII. Conclusion

For the forgoing reasons, EFR's and USFS's Motions for Summary Judgment should be granted, and Plaintiffs' Motion for Summary Judgment should be denied.

RESPECTFULLY SUBMITTED this 29th day of January, 2015.

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By: /s/ David J. DePippo

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to Clerk's to all CM/ECF registrants in this case.

By: /s/ David J. DePippo