No. 15-17069

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUIDIVILLE RANCHERIA OF CALIFORNIA, a federally recognized Indian Tribe,

Plaintiffs/Appellant,

v.

THE UNITED STATES OF AMERICA; SALLY JEWELL, the Secretary of the Department of the Interior; KEVIN WASHBURN, the Assistant Secretary-Indian Affairs; and THE CITY OF RICHMOND, a California Municipality,

Defendants/Appellees.

Appeal From a Decision of the United States District Court for the Northern District Of California, No.: 4:12-01326 – Honorable Yvonne Gonzalez Rogers

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REPLY BRIEF OF APPELLANT GUIDIVILLE RANCHERIA OF CALIFORNIA

Scott Crowell
Crowell Law Offices-Tribal Advocacy Group
1487 W. State Route 89A, Suite 8
Sedona, AZ 86336
Tel: (425) 802-5369
Fax: (509) 235-5107
Email: scottcrowell@hotmail.com

Michael P. Scott (SBN 139188)
P.O. Box 3802
Santa Rosa, CA 95402-3802
Tel.: (707) 799-4678
Email: Michael_p_scott@yahoo.com

Attorneys for Appellant
Guidiville Rancheria of California

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Plaintiff/Appellant Guidiville Rancheria of California ("Tribe") submits this Reply to Brief of Defendant/Appellee City of Richmond's ("City") "Brief for Defendant/Appellee City of Richmond" ("Opposition Brief").

I. INTRODUCTION

The District Court has placed the well-established Doctrine of Tribal Sovereign Immunity in jeopardy of serious erosion by ruling that a tribe's prayer for relief in a complaint for a contractual award of attorneys' fees constitutes a clear waiver of the tribe's immunity from suit. No court in any jurisdiction has gone there before, and this Appeals Court should reject the City's invitation to do so now.

The Tribe establishes in its Opening Brief that an effective waiver of sovereign immunity cannot be found in the Complaint's prayer for relief seeking an award of attorneys' fees beyond recoupment. The Tribe establishes in its Opening Brief that any waiver must have been provided in compliance with Guidiville's Constitution and Tribal law.

The City's Opposition Brief mostly abandons the reasoning of the District Court and instead contends that the Land Distribution Agreement ("LDA") (SER 161) contains a viable waiver of the Tribe's immunity. It does not. The City argues

that the Tribe, by agreeing to the LDA[1], the Tribe waived its immunity. The City contends that the provisions in the LDA constitute an express waiver of the Tribe's immunity even though lacking "talismatic words" to that effect. The LDA does not include a valid waiver of the Tribe's immunity. The City's argument is contradicted by the very language of the LDA. The City's analysis of the LDA language falls far short of the establishing unmistakably clear intent to waive immunity required by the well-established case. The District Court and the City simply ask too much.

II. STATEMENT OF THE CASE: THE GERMANE LANGUAGE OF THE LDA, INCLUDING THE FORM PROMISSORY NOTE.

The City focuses solely on the LDA's provision for attorney fees:

> 8.8 Legal Actions. (a) In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the party prevailing in any such action shall be entitled to recover against the party not prevailing all reasonable costs and expenses incurred in such action, including reasonable attorney fees and costs of any appeals.

[1] The City, in its Opposition Brief at p. 17, n. 4 abandons its position that the Tribe is not a third-party beneficiary to the LDA. That convenient shift in position does not change the relevant facts at the time the City executed the LDA. As discussed below, the document was deliberately drafted to be binding between the City and Upstream to the exclusion of the Tribe. That the Tribe was not a signatory to the LDA, itself, defeats the City's suggestion that the LDA provides for an unmistakably clear waiver of the Tribe's sovereign immunity If the LDA was intended to waive the Tribe's immunity, the waiver language in the Form Promissory Note would have been included in the LDA. Regardless of third-party beneficiary status, the evidence is clear the City did not intend for the LDA to waive the Tribe's immunity.

SER 161 at p. 19. The City fails to inform the Court that the LDA, however, also addresses the limited circumstances under which the Tribe does waive its sovereign immunity, which circumstances, under the express terms of the LDA, do not include the award of attorneys' fees set forth in Section 8.8. The issue is not one where the Tribe may "pick and choose which obligations of the LDA federal courts can enforce in a suit the Tribe initiated" (Opposition Brief at p. 4). Rather, the LDA specifically identifies those obligations, which federal courts can enforce against the Tribe, and those obligations which federal courts cannot enforce against the Tribe.

The LDA includes specific provisions addressing (i) specific remedies available to the City for breach of the LDA:

> 6.3 Default of Developer. . . Upon the happening of any of the events described above (other than the failure to provide funds, the Note and the Guaranty at Closing which shall be an immediate default), the City shall first notify Developer in writing of its purported default giving Developer sixty (60) days from receipt of such notice to cure such default. If Developer does not cure the default within such sixty-day period (or if the default is not susceptible of being cured within such sixty (60) day period, Developer fails to commence the cure within such period and thereafter to prosecute the cure diligently to completion), the City shall be afforded all of its rights at law or in equity by taking any or all of the following remedies: (i) terminate this Agreement in writing and/or (ii) seek any remedy against Developer available at law or in equity; and in all events the City shall be entitled to retain the Non-refundable Consideration described in Section 1.2;

SER 161 at p. 16 and (ii) a provision regarding applicable law

> 8.6 Applicable Law. This Agreement shall be interpreted under and pursuant to the laws of the State of California.

SER 161 at p. 19. The LDA also provides that, as a condition of closing the sale/transfer of the Pt. Molate lands, the Tribe will execute the Form Promissory Note set out as Exhibit C to the LDA. SER 161 at pp. 3-4, §1.4(c). In sharp contrast to the language of the LDA, the Form Promissory Note includes (i) an express waiver of the Tribe's sovereign immunity:

> The undersigned hereby expressly and irrevocably waives its sovereign immunity (and any defense based thereon) from any suit, claim, action or proceeding (including an arbitration proceeding) or from any legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution, exercise of contempt powers, or otherwise) in any forum, with respect to this Note.

SER 161 at C-4; (ii) an express consent to court jurisdiction:

> The undersigned hereby expressly submits and consents to the jurisdiction of the courts of the State of California (including all courts to which decisions of the courts of the State of California may be appealed), the courts of the United States, and the courts of any other state which may have jurisdiction over the subject matter, over any such action, and over the parties, with respect to any dispute or controversy arising out of this Note,

SER 161 at C-4; and (iii) an arbitration clause:

> If jurisdiction cannot be obtained in any of the courts described in the preceding paragraph, the City may, at its sole option, require that any claims or disputes arising under this Note be resolved in Oakland, California by binding arbitration in accordance with the Voluntary Commercial Arbitration Rules of the American Arbitration Association ("AAA") or any other rules mutually agreed upon by the parties. The undersigned, in waiving its immunity from suit or

> arbitration, recognizes and agrees that submitting to the rules of the AAA is deemed to be a consent that judgment upon any arbitration award may be entered in any court described herein.

SER 161 at C-4. However, the closing of the sale/transfer of the Pt. Molate property never occurred, and the Form Promissory Note was never executed[2].

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[2] Relevant to the related appeal, the Tribe is compelled to respond to a passage in the City's Statement of the Case in this appeal:

> Ultimately, given the significantly adverse environmental, socioeconomic, and other impacts of the project, the City exercised its discretion under the LDA not to permit a casino to be built on the land.

Opposition Brief at p. 7. The attribution that the City's failure to approve the project is motivated by adverse impacts of the project is baseless, and certainly not supported by the record. The Tribe, in its Opening Brief, states:

> Appellants' Opening Brief in the related and pending appeal, Case No. 15-15221, arising out of the same matter goes into far greater detail, which the Tribe incorporates herein by this reference.

Opening Brief at p. 3. The City in its Opposition Brief, states:

> The City describes the factual background to this case in detail in the brief it filed in the related appeal pending in this Court. See Brief for Defendant-Appellee City of Richmond, No. 15-15221 Dkt. No. 30. The City recounts that background in condensed form here.

Opposition Brief at p. 5. The relevant facts regarding the circumstances and manner in which the City killed the project are set forth in the related appeal. the Tribe is not responding in this Reply Brief to the City's summary of other facts relevant only to the related appeal. The Tribe's attempt to narrow the factual discussion to those relevant to this appeal should not in any way be viewed as concession or concurrence to the City's characterization of the facts at issue in the related appeal.

III. ARGUMENT

A. The LDA Does Not Waive the Tribe's Immunity from the City's Claim for Attorneys' Fees.

For support of its analysis that the LDA provides an effective waiver of the Tribe's sovereign immunity, the City cites to the Supreme Court case of *C & L Enters. Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411 (2001), four out-of-Circuit cases and one state court case (Opposition Brief at pp. 24-25). The Tribe welcomes the City's invitation to compare and contrast the language in the LDA with the waivers found in the cited case law. Indeed, the case law cited by the City provides:

> The *Rupp*[3] opinion distinguished this court's holding in *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1376 (8th Cir. 1985), in which the court found no waiver from language in a promissory note that provided various remedies in the event of default "in addition to such other and further rights and remedies provided by law," allowed for attorney's fees incurred in collection efforts, and stated that the law of the District of Columbia applied. The court stated that the tribe "did not explicitly consent to submit any dispute over repayment on the note to a particular forum, or to be bound by its judgment. **To derive an express waiver of sovereign immunity from a promissory note that merely alludes to 'rights and remedies provided by law,' that provides for attorney**

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[3] The City cites *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241(8th Cir. 1995) for the proposition that the Tribe cannot revoke a waiver simply because it does not like the court's rulings. Opposition brief at p. 15. *Rupp* found that the Omaha Tribe's affirmative request in its Complaint that all defendants assert their claims against it constituted an effective waiver. 45 F.3d at 1244. No such language can be found in Guidiville's Complaint against the City. See also, extensive discussion of *Rupp* in the Tribe's Opening Brief at pp. 23-24.

> **fees in the event of a collection action, and that contains a choice of law provision, simply asks too much."** *Id.* at 1380-81. We too distinguish *Standing Rock*. Unlike that case, the parties here specifically designated an arbitral forum to settle disputes under the contract, as well as arbitration rules that explicitly provide for judicial enforcement of any arbitration award. The parties clearly manifested their intent to resolve disputes by arbitration, and the Tribe waived its immunity with respect to any disputes under the contract.

Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc., 50 F.3d 560, 563 (8th Cir. 1995) (emphasis added). The LDA does not have an arbitration clause. The LDA does not designate a forum for resolving disputes. The District Court and the City simply ask too much.

This Ninth Circuit Appeals Court drew a similar distinction in *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006), wherein the disgruntled discharged employee urged the Appeals Court to find a waiver in his employment documents:

> This case is distinguishable from *C & L Enterprises* and *Marceau.* In *C & L Enterprises*, the Supreme Court held that the tribe waived its immunity by expressly agreeing to arbitration of disputes and to "enforcement of arbitral awards 'in any court having jurisdiction thereof.' " 532 U.S. at 414, 121 S.Ct. 1589. In *Marceau,* the tribe established a housing authority by ordinance that gave the tribe's "irrevocable consent to allowing the Authority to sue and be sued in its corporate name," and further provided that any judgment against the Authority would not be a lien on the Authority's property but would be paid out of "its rents, fees or revenues." 455 F3d at 981. The statements in Allen's employment documents did not approach these explicit waivers of immunity from suit; the statements' references to federal law did not mention court enforcement, suing or being sued, or any other phrase clearly contemplating suits against the Casino. These documents did not amount to an unequivocal waiver of the Casino's sovereign immunity.

464 F.3d at 1047. *See also Boricchio v. Casino*, 2015 WL 3648698 (E.D. Cal. 2015) ("Like *Allen,* the statements in the Casino's application 'might imply a willingness' to submit to a suit, but they do not constitute an express unequivocal waiver of immunity"); *Gilbertson v. Quinault Indian Nation*, 495 Fed. Appx. 779, 780, 2012 WL 3877627 (W.D. Wash. 2012) ("The language of the employee handbook stating that employees are 'protected' by Title VII was not a sufficiently clear waiver of sovereign immunity").

The Tribe, in its Opening Brief, distinguishes the circumstances here from those cases where tribes have affirmatively consented to have disputes resolved by arbitration, *C & L Enterprises* and its progeny. See Opening Brief at pp. 24-25. The City's Opposition Brief fails to respond to that analysis. The City cites *Rosebud Sioux* and *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996), both of which, like *C&L Enterprises*, found an effective waiver in the contracts' arbitration provisions. There are no comparable provisions in the LDA. The City's citation to *Sokaogon* is particularly disingenuous. The City suggests that Judge Posner held that a contract with a tribal entity constitutes a "waiver unless tribe 'hoodwinked' 'into giving up its immunity'." Opposition Brief at p. 24. Judge Posner rejected the Sokaogon Band's contention that it had been hoodwinked because the language of the contractual arbitration provision at issue was clear that Sokaogon could be sued. 86 F.3d at

660.

Two of the cases cited by the City, *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) and *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp*., 818 N.E.2d 1040, 1048 (Mass. 2004)[4] involved intergovernmental agreements codified into federal statutes that allocated jurisdictional authority over activities on the tribes' lands. The courts reasoned that the grants of jurisdiction to the States of Rhode Island and Massachusetts included as a matter of Congressional abrogation, waivers of the tribes' immunity. *Narragansett* 449 F.3d at 25; *Wampanoag* 818 N.E.2d at 1049. In contrast, there is nothing in the LDA that provides for the allocation of jurisdiction on the lands contemplated to be taken into trust for the benefit of the Tribe. The two cases cited by the City are not germane.

The remaining case cited by the City, *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000) is equally unavailing. In *Ninigret*, the First Circuit found an effective waiver in the Narragansett Tribe's housing ordinance wherein it expressly stated that the tribe's Housing Authority could "sue and be sued." 207 F.3d at 30-31. There is no comparable provision in

[4] Compare. *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Commission Against Discrimination*, 63 F. Supp. 2d 119, 123-124 (D. Mass. 1999) in which the federal court ruled that the same intergovernmental agreement and statute at issue in the state court *Shellfish* case did not include an effective waiver or Congressional abrogation of the tribe's sovereign immunity.

Guidiville tribal laws. To the contrary, as set forth in the Opening Brief, and discussed further in Section B, below, Guidiville tribal law requires a formal resolution by the Tribal Council in order to waive the Tribe's sovereign immunity from suit and specifically identifying the forum wherein the dispute resolution is to take place.

The City cites case law that the waiver need not include the talismatic words of "waiver of sovereign immunity", but that same case law, and Tribal law still requires the waiver to be unmistakably clear. *Arizona Public Service v. Aspaas*, 77 F.3d 1121, 1135 (9th Cir. 1995). The City's use of talismatic language in the Form Promissory Note and failure to use the same language in the LDA establishes, at a minimum, that the LDA's language falls far short of being unmistakably clear. Indeed, the difference between the language in the LDA and the clear language in the Form Promissory Note, at worst, renders the LDA language to be ambiguous, and therefore it must be interpreted in favor of the Tribe. (Opening Brief at p. 10). Moreover, the fact that the City drafted language and expected the Tribe to waive its immunity in the event that the sale of the property actually closed informs this Court that the City did not intend for the Tribe to waive its immunity with respect to the LDA. Indeed, it evidences that the City knew exactly what language should be included in a contract to effectuate a valid waiver, and elected not to include that language in the LDA. The remedial provisions of the executed LDA, as

opposed to the unexecuted Form Promissory Note, specifically provide for the City to take action against the "Developer" (Upstream), and do not mention the Tribe. The City's knowledge as to how to effectuate a valid waiver of the Tribe's immunity from suit, combined with the lack of the requisite language in the LDA, evidence the intent of the parties that the City's remedies under the LDA would be limited to actions against the Developer (Upstream), and would not include action against the Tribe, except to the extent expressly stated in the Form Promissory Note. The fact that the City conditioned the closing of the sale/transfer of the property on the Tribe's execution of the Form Promissory Note, but did not require the Tribe to execute the LDA, further evidences that there was no intent among the parties for the LDA to waive the Tribe's sovereign immunity. Moreover, the waiver in the Form Promissory Note is expressly limited to enforcement of the Form Promissory Note, and not enforcement of the LDA. If the LDA was intended to include an effective waiver of the Tribe's sovereign immunity, it follows that the language found in the Form Promissory Note would be included in the LDA. It was not.

The City's attempt to resurrect the failed conclusions of the District Court by advocating that the LDA itself establishes a valid waiver of the Tribe's sovereign immunity must also fail. The case law cited by the City is easily distinguishable. A comparison of the language in the body of the executed LDA with the language in

the unexecuted Form Promissory Note reinforces the proper result in this appeal: it is not unmistakably clear that the Tribe waived its immunity for an award of attorney fees based on the LDA. It is unmistakably clear that the City intended for the Tribe to waive its immunity under the limited circumstances set forth in the Form Promissory Note. The City's request for attorneys' fees falls outside those limited circumstances.

B. A Waiver of Immunity is Void if Not Authorized by a Council Resolution as Required by Tribal Law; is Void if Not Made By a Tribal Official(s) Duly Authorized Under Tribal Law.

The Tribe establishes in its Opening Brief at page 11 that any waiver of the Tribe's immunity is void if not made by a tribal official duly authorized under tribal law. The Guidiville Rancheria Constitution vests the Guidiville Tribal Council, as the governing body of the Tribe, with the sole authority to waive the Tribe's sovereign immunity. See Declaration of Donald Duncan (ER 60 - Doc. 271-1). The Guidiville Tribal Council has never waived the Tribe's sovereign immunity so as to subject the Tribe to an award of fees or any other relief in favor of the City. ER 60 - Doc. 271-1. Further, the Guidiville Tribal Council cannot vest, and has not vested, the Tribe's attorneys or Upstream with the authority to waive the Tribe's sovereign immunity. ER 60 – Doc. 271-1.

The City suggests that tribal law was satisfied because the Guidiville Tribal Council approved the LDA by formal resolution, which act allegedly included an

effective waiver. Opposition Brief at pp. 30-31. As set forth above, however, the LDA does not include an effective waiver. The City suggests that the waiver is effective even if the Tribe's lawyers lack authority to waive tribal immunity because "Guidiville has judicially admitted 'the existence of facts which show jurisdiction." Opposition Brief at p. 35. The City engages in circular reasoning. The judicially admitted facts are that the City and Upstream intended for the Tribe to benefit from the LDA, which begs the question of whether the LDA includes a valid waiver of the Tribe's sovereign immunity, rather than answer that question.

Further, if the City is correct that the Tribe's approval of the LDA constitutes a waiver of the Tribe's immunity, then that waiver is the language in the Form Promissory Note. Immunity waivers are to be construed narrowly. Accordingly, the alleged waiver is not effective because by the terms of the LDA, it is not to be in effect until the sale/transfer of the Pt. Molate property, and it is only to be effective to enforce the terms of the Form Promissory Note and not the LDA.

Moreover, the City misses the point. The Tribes' lawyers have no authority under tribal law to waive the Tribe's immunity. Accordingly, the District Court's analysis that a waiver can be found in the Tribe's prayer for relief in the form of an award of attorneys' fees is clear error. The City is correct to fold the issue of authority waivers by tribal officials into the issue of whether the LDA includes a

valid waiver. Absent a valid waiver in the LDA, the District Court erred.

The City is wrong to suggest, however, that a tribe's attorney can waive a tribe's sovereign immunity from suit when not authorized to do so under tribal law. The City does not dispute the case law cited by the Tribe to the contrary. Opening Brief at pp. 11-12.

It is ironic that the City's failure to proceed with the sale/transfer of the Pt. Molate property deprived the City of the waiver of the Tribe's sovereign immunity, duly authorized under Tribal law, which would have come into effect upon the execution of the Form Promissory Note. The lack of a valid waiver duly authorized under Tribal law, in and of itself, mandates a reversal of the award of attorney fees as against the Tribe.

C. The District Court's Stated Reasoning For Finding a Valid Waiver of the Tribe's Sovereign Immunity is Wrong.

The Tribe in its Opening Brief establishes that two of the principle cases relied upon by the District Court, *Rupp* (Opening Brief at pp. 23-24*)* and *U.S. v. Oregon,* 657 F.2d 1009 (9th Cir. 1981) (Opening Brief at pp. 21-23) are inapposite. The City merely parrots the District Court's analysis and does not, in any way, dispute the Tribe's detailed analysis that the two cases are inapposite. The third principal case relied upon by the District Court, *C & L Enterprises,* turns on the validity of the purported waiver in the LDA, discussed above and in the Tribe's Opening Brief at pp. 25-27. The Opposition Brief does not offer any refutation to

the analysis in the Opening Brief that the District Court's stated reasoning for finding a valid waiver of the Tribe's sovereign immunity is wrong.

IV. CONCLUSION

The Tribe and the City both agree that this case turns on the question of whether the LDA includes an effective waiver of the Tribe's sovereign immunity from suit. As set forth herein and in the Tribe's Opening Brief, the LDA does not include an effective waiver. Accordingly, the District Court's award of attorneys' fees as against the Tribe should be vacated and reversed.

The District Court makes a substantial departure from the extensive and well-established case law weighing against implied waivers, and only recognizing waivers where there is unmistakably clear language that a tribe intended to waive its immunity, and the waiver comports with tribal law. Prior to the District Court's decision, no court in any jurisdiction has extended the cases lacking the talismatic words of "waiver of sovereign immunity" to find a waiver by means of a tribe seeking an award of attorneys' fees in a complaint's prayer for relief. The Ninth Circuit Appeals Court should pull the District Court out of those uncharted waters and harbor the Doctrine of Tribal Sovereign Immunity in the calm waters of established case law.

Dated: June 7, 2016

s/ Scott D. Crowell

SCOTT D. CROWELL
Crowell Law Offices-Tribal
Advocacy Group
1487 W. State Route 89A, Suite 8
Sedona, AZ 86336
Tel: (425) 802-5369
Fax: (509) 235-5107
Email: scottcrowell@hotmail.com

Michael P. Scott (SBN 139188)
P.O. Box 3802
Santa Rosa, CA 95402-3802
Tel.: (707) 799-4678
Email: Michael_p_scott@yahoo.com

Attorneys for Appellant
Guidiville Rancheria of California

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 7, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

Melinda Haag, U.S. Attorney
DOJ-USAO
450 Golden Gate Avenue
San Francisco, CA 94102

Dated: June 7, 2016

/s/ Scott Crowell
SCOTT CROWELL
Crowell Law Offices-Tribal Advocacy Group
1487 W. State Route 89A,Suite 8
Sedona, AZ 86336
Tel.: (425) 802-5369
Fax: (509) 235-5017
Email: scottcrowell@hotmail.com

Attorney for Appellant Guidiville Rancheria of California

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 4,224 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2011 in 14-point Times New Roman font.

Dated: June 7, 2016

s/ Scott D. Crowell
SCOTT D. CROWELL