UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

NAVAJO NATION, *Plaintiff*, v. UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	CASE NO.: 16-cv-00465-MCA-LF (Consolidated with Case No. 16-cv-00931-MCA-LF) Hon. M. Christina Armijo, U.S.D.J. **REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT ENVIRONMENTAL RESTORATION, LLC'S MOTION TO DISMISS AND MOTION TO STRIKE [DOC. 101]**

I. Introduction

Plaintiff admits that EPA OSCs were "in charge" at Gold King and ER had to work "as directed by the [EPA] OSC." (See Compl. ¶ 79; Doc. 98-4 at 1.) Based on these allegations, ER cannot be liable under CERCLA because EPA—not ER—controlled all of the alleged actions that contributed to the Release and Plaintiff's alleged loss. In its Opposition, Plaintiff argues that ER controlled certain activities at Gold King, but Plaintiff fails to cite any factual (rather than conclusory) allegations in the Complaint that support its claims. In this same vein, Plaintiff's allegations also protect ER from state law liability under the Government Contractor Defense. Plaintiff argues that this defense does not apply, but its Opposition ignores the Supreme Court's binding and indistinguishable precedent in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), and relies on case law that the Tenth Circuit has rejected in the context of this case.

Plaintiff, a sovereign Indian tribe that sued in federal court principally under federal law, also attempts to run away from the effects of federal law on its state law claims for damages and injunctive relief. By adding Gold King to the National Priorities List ("NPL") and monitoring the effects of the Release, EPA has triggered the jurisdictional bar of 42 U.S.C. § 9613(h), and Plaintiff cannot circumvent established Tenth Circuit precedent on this bar. CERCLA also

preempts Plaintiff's state law claims for unrestricted monetary damages based on alleged injuries to a natural resource.

As to which state's law should apply to Plaintiff's tort claims, the Supreme Court has already performed the applicable choice-of-law analysis and Colorado, as the law of the state where the Release occurred, governs. Every effort by Plaintiff to ignore or attempt to circumvent this bright-line rule is unavailing. Thus, Plaintiff's joint and several liability claims should be stricken because Colorado has abolished joint and several liability by statute.

In sum, ER's Motion to Dismiss and Motion to Strike should be granted in their entirety.

II. Plaintiff Fails to State a Claim under CERCLA.

A. Plaintiff Fails to Allege that ER Is an Operator Because It Alleges that EPA—Not ER—Had Exclusive Control at Gold King.

ER cannot be liable as an "operator" at Gold King because Plaintiff fails to allege facts showing that ER actually controlled or had the authority to control the alleged actions that caused the Release and Plaintiff's alleged loss. (ER Br. at 7–9.) *See FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993). To the contrary, Plaintiff admits that an EPA OSC was "in charge" at Gold King at all relevant times (Compl. ¶ 79) and admits that all work plans had "to be submitted to the OSC for approval" (Compl. ¶ 67).

In its Opposition, Plaintiff relies on only two paragraphs in its Complaint, namely 123 and 68, to support its operator claim. (Opp. at 6.) Both are deficient. Paragraph 123 falls short because it does not allege any facts. Rather, it posits an unsupported legal conclusion that certain Defendants "were acting as operators at the Gold King Mine, in that the parties had authority to control and did control, manage, direct, and implement the conduct of those working on site."

(Compl. ¶ 123.) This conclusory statement (cribbed from *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998)) cannot defeat a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Paragraph 68 also fails to the satisfy the "actual control" and the "authority to control" tests. The "actual control" test examines the decisions that an operator made, *see FMC*, 998 F.2d at 846, but paragraph 68 does not allege that ER *actually made* any decisions or otherwise *exercised* control at Gold King. Thus, paragraph 68 fails to even address the "actual control" test, let alone satisfy it. Paragraph 68 also fails the "authority to control" test because Plaintiff's other allegations establish EPA's exclusive authority to control the activities of ER and any sub-contractor at Gold King. In addition to paragraphs 67 and 79, Plaintiff also relies on an "Action/Work Plan" (Compl. ¶¶ 72, 80),[1] which provides that all "project work" had to be performed "*as directed by the [EPA] OSC*" (Doc. 98-4 at 1). Plaintiff also ignores 40 C.F.R. § 300.5, which authorizes EPA OSCs "to coordinate *and direct*" response and removal actions.

The cases Plaintiff relies on in its Opposition go nowhere. *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) (Opp. at 6, 8), which was decided under less stringent, pre-*Iqbal/Twombly* pleading standards, did not involve an allegation that another party was "in charge" of the contractor's work. *Id.* at 1342 n.6. *Clean Harbors, Inc. v. CBS Corp.*, 875 F. Supp. 2d 1311 (D. Kan. 2012) (Opp. at 6–7), is further afield as it did not

[1] Plaintiff concedes that the Court can consider the Task Order and Action/Work Plan, but not the ERRS Contract. (Opp. at 8 n.2.) Plaintiff, however, alleges that ER was EPA's "contractor" (Compl. ¶ 5) and relies on documents that refer to the ERRS Contract (Docs. 98-3 at 1, 98-4 at 1). The ER-EPA contractual relationship is central to this case and Plaintiff does not dispute the ERRS Contract's authenticity. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (document may be considered when "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint"). In addition, EPA publicly released the ERRS Contract on its website. *Natural Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1166–67 (E.D. Cal. 2008) (taking judicial notice of contracts on U.S. government website). In any event, Plaintiff's allegations establish EPA's authority at Gold King without consideration of the ERRS Contract.

involve a contractor but whether a parent company operated a facility owned by its subsidiary. Neither of the unpublished decisions that Plaintiff offers as guidance (*Diamond X Ranch LLC v. Atl. Richfield Co.*, 2016 WL 4498211 (D. Nev. 2016); *BancorpSouth Bank v. Envtl. Ops., Inc.*, 2011 WL 4815389 (E.D. Mo. 2011) (Opp. at 7)) contain any relevant lessons because control itself was not the issue, but whether the operations related to pollution or hazardous materials.

The only reasonable inference that can be drawn from the Complaint is that EPA (not ER) actually controlled and had the authority to control all of the alleged activities at Gold King that resulted in Plaintiff's loss. Accordingly, this case aligns with *Ryland Group, Inc. v. Payne Firm, Inc.*, 492 F. Supp. 2d 790, 794 (S.D. Ohio 2005) (dismissing CERCLA claim against contractor that did not control the activities at the site), and *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1284, 1289 (N.D. Iowa 1994) (contractor that acted at other parties' direction was not an "operator"), and Plaintiff's operator claim should be dismissed.

B. Plaintiff Fails to Allege that ER Is an Arranger as Statutorily Defined.

For at least three independent reasons, Plaintiff fails to allege facts showing that ER, "arrange[d] for the transport or disposal of" hazardous substances. *See Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003). First, Plaintiff did not allege that ER took "intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 611 (2009). (ER Br. at 9.) The only allegation Plaintiff can point to is that ER was allegedly "excavating above the old adit" (Opp. at 9), but "excavating" above an adit does not address (let alone show) whether ER intended to "dispose" of hazardous substances inside the adit, especially when, as alleged, EPA entirely directed and controlled the excavation.

Second, Plaintiff did not allege that ER arranged for transportation or disposal by another

party, which is required under 42 U.S.C. § 9607(a)(3). *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004). (ER Br. at 9–10.) Plaintiff relies on *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006), to attempt to refute *American Cyanamid*, but the *Pakootas* court improperly added words to the statute in order to support its contrary view. *See id.* at 1080.

Apparently recognizing that *American Cyanamid* reflects the leading and enlightened interpretation of § 9607(a)(3), Plaintiff here concludes that it "alleged that ER arranged with other parties for the transport or disposal of waste." (Opp. at 10.) Plaintiff, however, fails to cite any paragraph in its Complaint that supports its argument. Neither paragraph 68 nor 80, which Plaintiff focuses on in this regard, refer to transporting or disposing hazardous substances, let alone arranging for such services by another party as the statute requires.

Finally, Plaintiff fails to allege any facts showing that ER, rather than EPA, controlled the transport or disposal of hazardous substances at Gold King. *Interstate Power Co.*, 909 F. Supp. at 1288. (ER Br. at 10.) Neither of the cases Plaintiff cites support its argument that ER had sufficient control to be an arranger. (Opp. at 10.) *Mathews v. Dow Chemical Co.*, 947 F. Supp. 1517 (D. Colo. 1996), hinged on allegations of knowledge of spills (later deemed insufficient in *Burlington*, 556 U.S. at 612–13), and facts not alleged here. *Id.* at 1525. In *California Dept. of Toxic Substances Control v. Payless Cleaners*, 368 F. Supp. 2d 1069, 1080 (E.D. Cal. 2005), the defendant was not working under another's direction. Ultimately, a party, like ER, that did not intend to dispose hazardous substances, did not arrange for another party to transport or dispose hazardous substances, and did not exercise any control, cannot be an arranger.

C. Plaintiff Fails to Allege that ER Is Liable as a Transporter.

Plaintiff fails to allege that ER actively and substantially participated in selecting a

disposal site, which as Plaintiff well knows (and does not contest), is a prerequisite for transporter liability under CERCLA. *See U.S. v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1994). (ER Br. at 11.) In its Opposition, Plaintiff does not cite any allegation in the Complaint showing that ER participated in selecting a disposal site. The best Plaintiff can do is argue that ER was (allegedly) "boring" into Gold King while (allegedly) knowing that contaminated water would be released. (Opp. at 11.) Plaintiff, however, does not cite any case nor provide a wisp of cogent argument that supports its novel theory that mere knowledge that a hazardous substance might or would be released as a result of another's direction is enough to establish transporter liability.

III. CERCLA Bars Plaintiff's Claim for Injunctive Relief under State Law.

Having filed in federal court and principally invoking federal law, Plaintiff oddly backpedals away from plain federal law that jurisdictionally bars Plaintiff's effort under state law to seek an injunction. In this effort, Plaintiff overstates what is required to trigger the jurisdictional bar of § 9613(h). (Opp. at 11–12.) As the Tenth Circuit explained in *Cannon v. Gates*, 538 F.3d 1328 (10th Cir. 2008), a case which Plaintiff ignores in its Opposition, § 9613(h) applies "once the Government has *begun* a removal action." *Id.* at 1333. (ER Br. at 11–13.) In this case, EPA began a removal action by adding Gold King to the NPL and commencing monitoring efforts. *See* 81 Fed. Reg. 62397, 62401 (Sept. 9, 2016). Nothing more is required. *See Cannon*, 538 F.3d at 1335; *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (§ 9613(h) applied once site was listed on the NPL, even if a Remedial Investigation/Feasibility Study was ongoing). Thus, § 9613(h) bars Plaintiff's Fifth, Sixth and Seventh Claims for Relief. (ER Mot. at ¶ 2.) *See, e.g., Scherer v. U.S.*, 241 F. Supp. 2d 1270, 1278 (D. Kan. 2003) (dismissing FOIA claims because the relief sought "is not available").

IV. CERCLA Preempts Plaintiff's Claims for Unrestricted Monetary Damages.

Plaintiff cannot avoid the Tenth Circuit's unequivocal holding that CERCLA "preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006).[2] (ER Br. at 13–14.) Contrary to Plaintiff's argument (Opp. at 13), *New Mexico*, like 42 U.S.C. § 9607(f)(1) itself by its own terms, applies to Indian tribes, like Plaintiff. *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1183 (N.D. Okla. 2009) (Indian tribe "may ***not*** recover damages for lost private use of land" because a "sovereign may pursue remedies designed to redress harm to natural resources ***only***, and state law remedies that would permit an unrestricted award of monetary damages are preempted by CERCLA") (citing *New Mexico*, 467 F.3d at 1247). All of Plaintiff's alleged injuries arise from the alleged contamination of the San Juan River (a natural resource). (E.g., Compl. ¶ 97.) Thus, CERCLA preempts Plaintiff's claims for "significant consequential damages." (Opp. at 14.) *See Satsky v. Paramount Commc'ns*, 7 F.3d 1464, 1470 (10th Cir. 1993) (State cannot claim "injuries to purely private interests"); *Quapaw Tribe*, 653 F. Supp. 2d at 1183 (limiting damages "to actual harm to natural resources over which Tribe may act as a natural resources trustee").

V. The Government Contractor Defense Protects ER from State Law Liability, as It Should When Plaintiff Alleges EPA Controlled the Relevant Events.

A. ER's Government Contractor Defense Is Not Premature.

Plaintiff's state law claims against ER should be dismissed because Plaintiff's allegations

[2] Although CERCLA contained "saving" clauses and did not "completely preempt state laws," the Tenth Circuit found that Congress did not intend "to undermine CERCLA's carefully crafted NRD scheme through these saving clauses." *New Mexico*, 467 F.3d at 1247. The saving clauses allow states to "set more stringent cleanup standards" and ensure that "private parties could base claims for personal and property injuries" on state law. *Id.* at 1246.

establish all of the elements of the Government Contractor Defense ("GCD"). (ER Br. at 14–23.) *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 203, 206–07 (5th Cir. 2009) (affirming grant of a motion to dismiss under the GCD);[3] *Adkisson v. Jacobs Eng'g Group, Inc.*, 790 F.3d 641, 649 (6th Cir. 2015) (remanding to assess whether state claims against federal environmental clean-up and remediation contractor should be dismissed under Rule 12(b)(6) based on the GCD). As with any affirmative defense, the GCD warrants dismissal if the factual prerequisites are set forth in the Complaint and matters subject to judicial notice, as they are in this case.

B. Plaintiff Alleges All of the Elements of the GCD.

This case involves uniquely federal interests because Plaintiff alleges that ER was a federal "contractor" working for EPA (Compl. ¶ 5). (ER Br. at 15.) *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 n.1 (1988) ("[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, ***is an area of uniquely federal interest***."). Plaintiff, as in other of its contentions, overlooks this plain statement of law.

There is also a significant conflict between federal and state law because requiring EPA contractors to comply with state law while working on a federal project like Gold King "would frustrate specific objectives of federal legislation," which grants EPA broad discretion to manage such projects. *Boyle*, 487 U.S. at 507. If Plaintiff's musings were anything akin to law (see Opp. at 16), a federal government contractor working on a federal project under the direction of a federal agency acting within the scope of its authority under federal law would have a legal obligation to ***disobey*** the federal government's directions if those directions conflict with state

[3] Plaintiff apparently overlooked ER's prior citation to *Ackerson* (ER Br. at 6) because Plaintiff mistakenly argued that ER "cites not a single case granting a motion to dismiss based on the GCD." (Opp. at 15.)

tort law duties—including those of a neighboring state. In juxtaposition to Plaintiff's averments, the Supreme Court created the GCD to avoid these very kind of conflicts and to thereby allow the Government and its contractors to focus on "getting the Government's work done." *Boyle*, 487 U.S. at 505. Plaintiff attempts to argue that "ER's state-imposed duty of care" was aligned with its alleged "contractual duties," but the only paragraph in the Complaint that Plaintiff cites that refers to state law is paragraph 69 (Opp. at 16), which selectively quotes ER's 2014 RFP. Plaintiff does not cite any authority to support its novel theory that an EPA contractor's RFP can not only bind EPA, but also authorize the contractor to disobey the EPA's directions.[4]

In the same vein, as diligently and ably as it may try, Plaintiff cannot avoid the discretionary function exception of the Federal Tort Claims Act ("FTCA"). First, Plaintiff fails to identify any "statute, regulation or policy [that] *specifically prescribe[d]* a course of action" at Gold King. *Johnson v. U.S.*, 949 F.2d 332, 337 (10th Cir. 1991). Plaintiff argues that "agreements between EPA and ER required compliance with particular safety regulations and standards" (Opp. at 17–18), but Plaintiff neither alleges in its Complaint nor identifies in its Opposition any specific course of action that was prescribed or prohibited by these regulations. Plaintiff cites *Bell v. U.S.*, 127 F.3d 1226 (10th Cir. 1997) (Opp. at 17), but that case highlights the fatal flaw in Plaintiff's claim. In *Bell*, the government allegedly breached its contractual duty to perform a *specific* task: move a pipeline. *Id.* at 1229. Plaintiff, however, fails to allege that the Substitute OSC was bound by law, policy or contract to perform a similarly specific task.[5]

Second, Plaintiff fails to allege facts that would overcome the presumption that EPA's

[4] Notably, paragraph 69 refers to "requirements of the State of *Colorado*," ***not*** New Mexico. (Compl. ¶ 69.)
[5] The Original OSC's email (Opp. at 18 n.9) is insufficient because it was not a "specific and mandatory" statute, regulation or policy and another OSC was "in charge" on the day of the Release (Compl. ¶ 79). (ER Br. at 19–20.)

activities at Gold King were grounded in policy. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542 (10th Cir. 1992). The Tenth Circuit previously rejected an argument identical to Plaintiff's, namely that safety judgments fall outside the scope of the discretionary function exception (Opp. at 18). *Johnson*, 949 F.2d at 339 n.9 (safety policies did not make the government's "decisions any less discretionary, or remove them from the discretionary function exception"). Indeed, no safety regulation would ever countenance any alleged lack of safety or any accident like what happened here, thus asserting an actual, conjured or unstated safety regulation as a means to defeat application of the GCD would effectively undermine the whole of the defense (no one gets sued if everything goes right).

Plaintiff's argument that EPA and ER "failed to act with due care" once they allegedly selected a course of action fails as a matter of pleading and law. (Opp. at 19.) Plaintiff has only alleged a series of negligent planning decisions, which are all susceptible to policy analysis; *e.g.*, how to test the water level inside Gold King, whether to excavate, and the adequacy of the safety plan.[6] Plaintiff cites *Indian Towing v. U.S.*, 350 U.S. 61 (1955) (Opp. at 19), but the Tenth Circuit and other circuit courts "have expressly recognized that *Indian Towing* is ***simply not persuasive authority*** in the context of the discretionary function exception." *Harrell v. U.S.*, 443 F.3d 1231, 1237 (10th Cir. 2006) (citing cases). Plaintiff must have overlooked this case as well.

Plaintiff cannot avoid the unavoidable and unmistakable implications of the allegations in its Complaint, which establish that ER complied with reasonably precise directions from EPA. Plaintiff quoted a Task Order which provides that all work plans had to be submitted to and

[6] An alleged "failure to warn" (Opp. at 19) is also a discretionary function if, as here, it involved policy judgments. *See Tippett v. U.S.*, 108 F.3d 1194, 1199 (10th Cir. 1997); *Miller v. U.S.*, 710 F.2d 656, 665 (10th Cir. 1983).

approved by EPA (Compl. ¶ 67); referenced and relied on an Action/Work Plan (Compl. ¶ 72, 80), which states that all "project work" had to be performed "as directed by the [EPA] OSC" (Doc. 98-4 at 1); and alleged that an EPA OSC was "in charge" during all relevant times leading up to and through the Release on August 5, 2015 (Compl. ¶ 79). Completely absent from the Complaint is ***any*** allegation that ER did not comply with the directions of the EPA OSC who was "in charge" at Gold King on the day of the Release. The only inference that can be drawn from these allegations is that EPA directed the work at Gold King and ER complied, thus ER cannot be liable for any of Plaintiff's state law claims under *Yearsley* and *Boyle*.

C. The GCD Is Not Limited to Military Procurement Contracts.

Contrary to Plaintiff's next mistaken contention (Opp. at 21–22), the "weight of authority" has applied the GCD to both military and non-military contractors, and to both service and procurement contractors. *See, e.g.*, *In re World Trade Center Disaster Site Litig.*, 521 F.3d 169, 196–97 (2d Cir. 2008); *Bennett v. MIS Corp.*, 607 F.3d 1076, 1089–91 (6th Cir. 2010); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 203, 206–07 (5th Cir. 2009); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1127 (3rd Cir. 1993); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 421–23 (D.S.C. 1994).

Plaintiff's argument ignores the fact that the origins of the GCD predate *Boyle* (decided in 1988) and arose out of the Supreme Court's earlier decision in *Yearsley*—a case involving a government *services contractor* working for the U.S. Army Corps of Engineers on a civilian project to build dikes in the Missouri River. *Yearsley*, 309 U.S. at 20–21 (contractor not liable under state law because its work was "authorized and directed by governmental officers").

Unable to distinguish *Yearsley* from the facts it alleges in this case, Plaintiff continues in its now predictable pattern and ignores this binding Supreme Court precedent. Moreover, in applying *Yearsley* to the facts of *Boyle*, the Supreme Court explained that there was "***no basis for a distinction***" between government services and government procurement contracts. *Boyle*, 487 U.S. at 506. Consequently, this central pillar of Plaintiff's contentions falls, as does the rest of Plaintiff's attack on ER's entitlement to assert and obtain dismissal under the GCD.

VI. Plaintiff's Joint and Several Liability Claims Should Be Stricken.

The Supreme Court has already performed the applicable choice-of-law analysis to determine what state law applies when a release of hazardous substances occurs in one state and travels to another state: the law of the state where the release occurs applies. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987). Plaintiff attempts to limit *International Paper* to Clean Water Act cases (Opp. at 23 n.15), but federal circuit courts have applied *International Paper* in other cases involving interstate contamination. *See In re Deepwater Horizon*, 745 F.3d 157, 171 (5th Cir. 2014); *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 306 (4th Cir. 2010).[7]

VII. Conclusion

The Court should grant ER's Motions to Dismiss and Strike in their entirety, and should dismiss Plaintiff's Complaint with prejudice. Plaintiff does not dispute that it had at its disposal scores of documents relating to the Release that were released by EPA before Plaintiff filed its Complaint, nor does Plaintiff dispute that any amendment would be based on those documents. *See Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1184 (10th Cir. 1990).

[7] Plaintiff's choice-of-law analysis also ignores the FTCA. *See Wright v. U.S.*, 568 F.2d 153, 156 (10th Cir. 1977) (in FTCA suits, "the law of the place where the alleged negligent conduct or omission occurred must be applied.").

DATED: January 25, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2017, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Andriy R. Pazuniak