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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

ROSITA GEORGE, Plaintiff, vs. OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION, AN ADMINISTRATIVE AGENCY OF THE UNITED STATES, Defendant.	No. CV-3:17-CV-08200-dlr **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. PRELIMINARY STATEMENT

Plaintiff, Rosita George brings this administrative appeal to have her application for relocation assistance benefits be granted and the Office of Navajo and Hopi Indian

Relocation ("ONHIR") decision, which denied her application, be overturned. At the administrative level, Plaintiff established that she was a legal resident of the Hopi Partitioned Land ("HPL") as of July 7, 1986. ONHIR stipulated to her residency. The only issue was whether Ms. George was the Head-of Household by July 7, 1986, the date ONHIR promised Congress its relocation program would be complete. The evidence showed that as of July 7, 1986, Ms. George was self-sufficient, employed and living independently with a roommate in Flagstaff. The ONHIR wrongfully denied Plaintiff's application following an administrative hearing. ONHIR's determination, based on the Independent Hearing Officer's ("IHO") decision, is arbitrary and capricious, contrary to law, and not supported by substantial evidence, as the IHO selectively chose evidence that led to a denial in the record and, ignored compelling evidence, and made arbitrary credibility determinations in his decision. Accordingly, Plaintiff requests this Court reverse ONHIR's decision denying benefits pursuant to the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706.

The modern Navajo-Hopi Land Dispute began in 1882 when approximately 2.5 million acres of Arizona land was set aside for the Hopi Tribe "and such other Indians as the Secretary of Interior may see fit to settle thereon." *See Bedoni v. Navajo-Hopi Indian Relocation Com'n*, 878 F.2d 1119, 1121 (9th Cir. 1989). Over time, a sizable Navajo population settled in the area. *Id.* In 1958, Congress authorized a three-Judge District Court to entertain litigation between the Tribes to determine their respective ownership interest in the land. Pub. L. No. 85-547, 72 Stat. 402 (1958). In 1962, this

Court determined that 1/6 of the land, Grazing District Six, belonged exclusively to the Hopi reservation and that the remaining 5/6 of the land constituted a "joint use area" (hereinafter "JUA"), which was jointly owned by the Hopi and Navajo Tribes subject to trust title of the United States. *Healing v. Jones*, 210 F. Supp. 125, 192 (1962) *cert. denied* 373 U.S. 758 (1963) (per curiam). However, the *Healing* Court concluded it lacked power to partition the JUA between the tribal co-tenants. On December 22, 1974, Congress passed the Navajo-Hopi Settlement Act, Pub. L. No. 93-531 (hereinafter "Settlement Act"), which appointed a mediator to attempt to resolve the land dispute voluntarily, and gave the *Healing* Court the residual power to divide the land between the tribes on an equal basis should the mediation fail. *See Bedoni*, 878 F.2d at 1121. During the mediation period, a building "freeze" was put into effect in 1973, which prohibited Navajo residents from repairing existing homes or building new structures. The following year, a livestock reduction program was put into place, threatening to seize the livestock of Navajo residents. *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974). After the mediation failed, the JUA was finally partitioned by the Court in 1978, and a fence was erected to separate the lands. *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978); 25 C.F.R. § 168.13.

With the passage of the Settlement Act, the once self-sufficient residents of the HPL were now living under the fear of being removed, could not provide for their families and could not maintain their homes. Congress recognized that people subject to relocation would have to leave the disputed land for work, and specifically included

relocatees as eligible for benefits who moved away to earn a better living for their families. *See* Comp. General Report 1978 B-114868 1978 WL 11375.

II. THE LEGAL FRAMEWORK FOR ELIGIBILITY PURSUANT TO THE SETTLEMENT ACT AND PROOF OF HEAD OF HOUSEHOLD

The issue in this matter is whether Ms. George proved that she was self-supporting or head of household by July 7, 1986. The Defendant has stipulated that on July 7, 1986, Ms. George was a legal resident of the Hopi Partitioned land. (***CAR 000142***).

To receive relocation assistance benefits, a Navajo applicant has the initial burden to show that he/she was a legal resident of land apportioned to the Hopi Tribe between December 22, 1973 and December 22, 1974, and that he/she was a head of household at the time of relocation. 25 CFR § 700.147 (a), (b); Pub. L. No. 93-531, §15(g), 88 Stat. 1719, *formerly codified* at 25 U.S.C. § 640d-14(c).

In order to prove head of household, it must be shown that he/she "actually maintained and supported him/herself." 700.69 CFR (b). The single person relocatee must further prove that he/she was head of household at the time he/she moved from the HPL (25 CFR 700.69 (c)) or by July 7, 1986, the date ONHIR represented to Congress that the relocation of Navajo and Hopi would be completed. 25 CFR 700.147 (e). ("Relocation benefits are restricted to those who qualify as head of households as of July 7, 1986"). *Id.*

In 1984, or thereabout, legal counsel for ONHIR (then called NHIRC), Susan Crystal, Esq., in an undated Memorandum to the Executive Director set forth agency

policy which interpreted how to apply the terms "head of household' and "self-supporting." [**Exhibit "A"**]. Ms. Crystal found that the general assistance level for an individual was "$1,300.00 per year." Ms. Crystal states that this $1,300.00 per year creates a presumption of self-support. Proof of income can be provided by "W2 forms, or tax returns" showing income that exceeds $1,300.00 per year. The Eligibility and Appeals Branch refers to the $1,300.00 per year as "a presumption of an Applicant being self-supporting." (***CAR 000144***). The Crystal Memorandum states that traditional forms of income will be recognized by ONHIR:

> In some circumstances, individuals may be able to show that they are self-supporting without the benefit of tax returns and wage statements because of the lifestyle on the HPL. It is common for individuals to make a living from livestock or support themselves through odd jobs throughout the Reservation. The Commission has always considered these factors in its determination of head-of-household status. In most cases, individuals falling into this category are older and engaged in a traditional lifestyle. Those who fall into this category will be considered on the basis of the facts of the case.

The ONHIR Management Manual adopts Ms. Crystal's Memorandum and requires intake employees at the agency to review documentary forms of income such as wage statements, check stubs, SSI benefit awards, etc. *See* Management Manual §110 (3) "Documents required for a single person who maintains and supports himself." [**Exhibit "B"**].

The ONHIR Management Manual also, like Ms. Crystal's Memorandum, recognizes that an applicant can prove "self-support" without "proof of cash income" and the applicant's evidence is to be reviewed by a "DCC Manager" who will consider

the applicants "unique circumstance and authorize a field investigation or other substantiating records". The applicant is to be noticed on what further "alternative documentation [is] required." *Id*.

This Court has recognized the $1,300.00 per year presumption of self-support and that self-support can be proved without paper documentation. In *O'Daniel v. Office of Navajo Hopi Indian Relocation,* 2008 WL 4277899, the Court stated:

> In order to be considered self-supporting, ONHIR policy requires that the applicant establish that he or she earned $1,300.00 per year in income. (Dkt. #23-4, p. 6). However, ONHIR policy also recognizes that "[i]n some circumstances, individuals may be able to show that they are self-supporting without the benefit of tax returns and wage statements because of the lifestyle on the HPL. It is common for individuals to make a living from livestock or support themselves through odd jobs throughout the Reservation.

See also Benally v. Office of Navajo and Hopi Relocation, 2014 WL 523016. ("To be considered self-supporting, ONHIR regulations required Plaintiff to establish that he earned $1,300.00 per year in income".) In *Begay v. Office of Navajo and Hopi Indian Relocation,* 2017 WL 4297348, the Court found that the IHO's decision in denying Plaintiff's head-of-household claim was "arbitrary, capricious and unsupported by evidence," and based the remand on Plaintiff's oral testimony regarding his work and cash payments.

In this matter, the Hearing Officer's decision was arbitrary and capricious and not in accordance with law because he ignored relevant evidence and focused on dismissing the corroborating witness testimony.

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III. STANDARD OF REVIEW OF AGENCY ACTION THAT IS ARBITRARY AND CAPRICIOUS

Under the arbitrary and capricious standard, the reviewing court must consider whether an agency decision was premised on a consideration of the pertinent legal factors and whether there has been a clear error of judgment. *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The agency's decision must be based on a "reasoned evaluation" of the appropriate factors. *Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transportation*, 113 F.3d 1505, 1511 (9th Cir. 1997). The inquiry by the reviewing court must be searching and careful. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

A reversal of an agency decision is warranted if the agency action "was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *Charles v. ONHIR*, No. CV-16-08188-PCT-SPL, at *2 (D. Ariz. Sept. 5, 2017). *California Energy Com'n* at 1150. *(*"We will overturn a decision as 'arbitrary and capricious' when the agency failed to articulate a rational connection between the facts found and the conclusions made).

While the standard of review is deferential, there must be a rational connection between the facts found and the result reached. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agriculture*, 499 F.3d 1108, 1115 (9th Cir. 2007).

1. The IHO Misapplied the Agency Policy and Therefore His Decision is Arbitrary and Capricious.

The IHO in evaluating and deciding the George Appeal erroneously decided Ms. George must prove that she was self-supporting in the first 187 days of 1986 (January 1 – July 7) and that she did not earn $1,300.00 in income through W2, check stubs or other "demonstrable proof" in that period. The IHO finds Ms. George made $742.62 from January 1, 1986 to July 7, 1986. (***CAR 000163, Findings 6-7***).

Ms. George was a legal resident of Tonalea/Red Lake through July 7, 1986. 25 CFR 700.147 (e). Her burden is to show she was self-supporting (head-of-household) by July 7, 1986. Although $1,300.00 is a per year standard, the IHO arbitrarily changed it to a 187-day standard (January 1 – July 7). The IHO then arbitrarily found that Ms. George did not meet the presumption. The IHO essentially moved the goalpost while the kick was in the air. Logically, if there is a presumption of self-sufficiency through $1,300.00 of income in a 365-day period, the applicant should not have to show $1,300.00 of income in 187 days. In the first 187 days of 1986, the applicant's burden was to show income of $665.72. ***(See Statement of Fact ("SOF") 20).*** ONHIR estimated her income as of July 7, 1986 at $1,074.85. (***CAR 000144; SOF 18)*** Thus, using the IHO's calculation of $742.62 by the cutoff of July 7, 1986, Plaintiff met the administrative presumption of self-support and should be granted relocation assistance benefits by this Court. The Court should rule that the IHO's change of the administrative standards was arbitrary and capricious and not in accordance with the Settlement Act. It is arbitrary and capricious to require all relocatees to prove head of household income using a calendar year, but required Ms. George, who became head-of-household in 1986,

to prove the presumptive $1,300.00 in six months and five days. The IHO essentially changed ONHIR policy and made the $1,300.00 an irrebuttable presumption. The IHO's decision is in violation of ONHIR regulations and rules, and his final decision is irrational and should be overturned.

2. Ms. George Demonstrated Through Competent Evidence that on July 7, 1986, She was Self-Supporting.

Ms. George, on July 7, 1986, was turning twenty-one years of age in sixteen days. She was a legal resident of the HPL but living in Flagstaff for employment purposes. (***CAR 00013***).

In 1986, her gross income was $3,371.00. (***CAR 00035; SOF 17***). Between January 1 and July 7, 1986, she worked for Coconino County (started in June 1986), Burger King, Allstar Inns, and for her brothers-in-law's Kachina dolls business. (***CAR 00027***). When she went home to the HPL, she took her mother food and basic necessities. (***CAR 000108***). From January 1 to June 1, 1986, she lived with her sister and brother-in-law and worked for them. (***CAR 000106, L 9-12***). After June 1, 1986 she moved into an apartment that she shared with a friend. (***CAR 000163; CAR 000130, L 9-9***).

The regulatory criteria for head-of-household is a single person who "actually maintained and supported herself" 25 C.F.R. (a) (2). *See also* ONHIR management manual 1110 (Head-of-Household is "a single person who is self-supporting"). [**Exhibit "B"**].

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The IHO arbitrarily ignores that Ms. George in 1986 was a 21-year old high school graduate who was self-sustaining and independent of her mother and in fact she helped support her mother. The IHO arbitrarily and erroneously focused on her traditional income and characterized it to dismiss the Application. The IHO then imposed a $1,300.00 per year requirement on a six-month passage of time. The IHO's evaluation is not reasonable. *Price at 1511*. The IHO ignores competent and relevant evidence in order to justify his conclusion. The decision of the IHO runs contrary to the evidence and is therefore arbitrary and capricious. *Marsh at 378*. The Court should overturn the IHO's decision.

The IHO ignores the relevant evidence to focus solely on the issue of whether traditional income satisfies the $1,300.00 presumption. *See Gallant v. Heckler,* 753 F.2d 1450, 12456 (9th Cir. 1984) (error for the ALS to ignore or misstate the competent evidence in the record in order to justify his conclusion). The IHO focused on whether Ms. George's traditional income met the $1,300.00 presumption and ignored the relevant testimony that would justify the Applicant being found head-of-household and entitled to benefits. This arbitrary decision by the IHO requires this Court to overturn the decision.

3. The Hearing Officer Has Misapplied ONHIR's Policy on Traditional Income in an Arbitrary and Capricious Manner.

The IHO set aside all testimony regarding Ms. George's cash income selling Navajo arts and crafts. The IHO in a past hearing stated that he will not recognize testimony regarding cash income from traditional work or otherwise without a receipt

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or paper proof. In the Dean Begay Appeal, the IHO made his "policy" known and stated: "The undersigned has repeatedly stated that such testimony, given 30 years after the fact, and without documentation is inherently unreliable and is not credible." *In the matter of the Application of Dean Begay #4986,* at Page 7-8. [**Exhibit "C"**].

The IHO's position is contrary to ONHIR Policy. The Agency, starting with the Crystal Memorandum and then in its Management Manual §110 (3), recognized the need to have a head of household category of "unique circumstances" for applicants who do "not have proof of cash income." *Id* at 1110 §3. No matter what testimony is presented by an applicant, the IHO will disregard it if it is not backed up by "paper proof." This unwritten policy, in fact, is a personal bias and violates Agency Policy. In this case the IHO does not follow Agency Policy, but instead he makes broad, sweeping characterizations of the Applicant and her witnesses' testimony.

The testimony of Ms. George and Cecelia Sims demonstrated that in 1985, Ms. George, after graduating from high school, moved to Flagstaff and lived with her sister, Lorena Tsinnijinnie, and her husband. (***CAR 000104; SOF 5***). Her brother-in-law, Donald Tsinnijinnie, had an arts and crafts business. (***CAR 000104***). Ms. George and her aunt, Cecelia Sims, sold Navajo kachinas, lamps and purses fabricated by her brother-in-law and her brother. (***CAR 000105; SOF 7***). They sold these crafts from Flagstaff to Albuquerque and everywhere in between. (***CAR 000118 – 000119; SOF 7***). They were paid in cash by their brother-in-law and there were no documents generated in the working relationship. (***CAR 000109 – 000128; SOF 7*****).**

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The amount they were paid was between one hundred and two hundred dollars every two weeks. (***CAR 000105; SOF 7***). Ms. George estimated she made "in a year" probably close to two thousand dollars. (***CAR 000109***). Her aunt kept the money and payment was mostly in cash. (***CAR 000113***).

Ms. Sims testified in detail on how the sales were conducted. They were either given orders to fill or they did door-to-door sales. ("We went all over, we went to Hobrook, Albuquerque and Sedona"). (***CAR 000119 – 000120***).

Ms. Sims' testimony was more detailed about the sales job that they both had 28 years before the hearing. All specific and relevant matters were agreed to by both witnesses, although there were some inconsistencies regarding whether they made $250-$300 a week or every two weeks, or $2,000.00 a year. These are minor inconsistencies because whether it was once a week, twice a month or $2,000.00 a year, all these would meet the administrative presumption of $1,300.00 a year. The IHO's personal policy of not accepting traditional cash based income is irrational and violates ONHIR policy. **(Exhibit B)** The rational analysis is that the consistent testimony proved self-support and the IHO's decision is arbitrary and capricious.

IV. THE IHO'S CREDIBILITY FINDINGS ARE ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The IHO has a duty to include "specific, cogent reason[s]" for any negative credibility findings in his decision. *See De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 2010). This Court must defer to an agency's negative credibility findings only if the findings are "fairly supported by the record" and the IHO provides "specific and cogent

1 reason[s]" for those findings. *Hossain v. INS*, 7 Fed. Appx. 760 (9th Cir. 2001); *see also*
2 *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990). When the IHO provides specific
3 reasons for his negative credibility findings, this Court may evaluate those reasons to
4 determine whether they are valid and cogent. *See Hakobyan v. Ashcroft*, 86 Fed. Appx.
5 353, 356 (9th Cir. 2004). "Minor inconsistencies in the . . . testimony will not support
6 an adverse credibility determination." *Id.* The inconsistencies "must go to the heart" of
7 the applicant's claim to justify negative credibility findings. *Id.* "When the decision of
8 an [IHO] rests on a negative credibility evaluation, the [IHO] must make findings on the
9 record and must support those findings by pointing to substantial evidence on the
10 record." *Cegerra v. Secretary of Health & Human Services*, 933 F.2d 735, 738, 740
11 (9th Cir. 1991). The IHO's reasons for discrediting the sworn testimony must be "clear
12 and convincing." *See Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007). The Court
13 customarily defers to credibility determinations made by administrative hearing
14 officers, but the hearing officer still must give "specific, cogent reasons" for any
15 adverse credibility finding. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

16 The substantial evidence standard of review applies to IHO's factual
17 findings and credibility determinations. *See Kappos v. Hyatt*, 566 U.S. 431, 435
18 (2012). The standard requires such relevant evidence as a reasonable mind might
19 accept as adequate to support a conclusion. *De la Fuente v. FDIC*, 332 F.3d 1208,
20 1220 (9th Cir. 2003). The substantial evidence standard requires the Court to
21 review the administrative record as a whole, weighing both the evidence that

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supports, and detracts from, the agency's determination. *Id*. Applying these principles to the administrative record here, the IHO's factual and credibility findings are unsupported by substantial evidence and rest on unfounded and arbitrary and capricious assumptions.

This Court has overturned ONHIR's IHO in three cases involving credibility witnesses and/or the IHO impermissively engaging in speculation. In *Begay v. ONHIR*, No. CV-16-08221-PCT-DGC, 2017 WL 4297348, at *4 (D.Ariz. Sept. 28, 2017), the Court found that the IHO's decision was arbitrary, capricious, and unsupported by substantial evidence because "[t]he Hearing Officer made assumptions about payment practices on which he had no evidence." In *Mike v. ONHIR* 2008 WL 54920, the Court held that the IHO found some of the witnesses' testimony credible and some not credible, but the IHO "failed to explain why he found the witnesses credible in some respects but not in others." The *Mike* Court concluded that the IHO's decision was "arbitrary and capricious, and unsupported by substantial evidence". In *Manygoats v. ONHIR*, 735 F. Supp 949 (1990), the Court found the IHO disregarded the family's testimony as to the date of relocation and relied on speculation which was "unsupported by substantial evidence." *Id* at 953-954.

In the case at bar, the IHO found all of Ms. George's corroborating witness "not credible." ***(CAR 00165)***. However, the IHO found Ms. George was credible regarding

everything but her employment with her brother-in-law, because she had no documents that proved income from the sale of the arts and crafts. The IHO also found her memory "of events more than 28 years ago, without any corroboration, is unreliable." ***(CAR 000163-164).*** The IHO found Ms. George's corroborating witness, her aunt, Cecilia Sands, not a credible witness regarding her testimony of selling arts and crafts for Ms. George's brother-in-law because there are no documents from 28 years ago. He found Ms. Sands' memory is unreliable based on the passage of time. The IHO fails to recognize that the 28 year delay was ONHIR's fault and that no rational individual would keep all of their employment records or remember every detail of an employment 28 years before the testimony.

The IHO does not provide the Court with "specific, cogent reasons" for his findings as is required. *Devalle* at 792. The IHO in a wholesale manner disregards Ms. George's specific testimony and Ms. Sands' specific testimony about the arts and craft business and their roles as saleswomen. However, the IHO decision has seven paragraphs of specific factual findings based on Ms. George's testimony. The IHO only finds the income testimony regarding the arts and crafts sales "not credible" because there is no paper evidence from 28 years ago. The IHO never explains why he finds the majority of the witnesses' testimony credible and the basis for his factual findings but he in turn finds the income testimony not credible. *See Mike* at 5. The IHO uses his credibility findings as a tool to justify his pre-determined decision. When the IHO attempts to justify his credibility findings, it devolves into unfortunate speculation and

evidences a bias against this applicant. ***(CAR 000166-167)***. The IHO speculates that to pay Ms. George and Ms. Sands, the brother-in-law's shop would have to produce seventy items a week, which he characterizes as "enormous." ***(CAR 000167).*** He further dehors the record and engages in a speculative rant about his guess as to the cost of sales and labor in Mr. Tsinnijinnie's business in 1985-1986. There is no evidence that the family business was incapable of supporting two young sales persons. It is because of this type of speculative reasoning that the Courts chastise Hearing Officers from "reaching a conclusion first and then attempting to justify it by ignoring competent evidence in the record that suggests a different result." *Varne v. Secretary of Health and Human Services,* 859 F.2d 139,6 1398 (quoting *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). The IHO conveniently leaves out the evidence that it was a family business and not just one person was fabricating the crafts. ***(CAR 000150).*** He also leaves out that Ms. George's brother-in-law is a well-known artisan. ***(CAR 000129)***. The IHO believed that Ms. George worked for her brother-in-law and was paid something. He engages in a speculative analysis that if each item sold for $50.00, she would have made $5,000 to $13,000 in a year. However, he loses site of the issue that she had $742.62 in documented income by July 7, 1986 and would only need, according to his misreading of the regulations, another $557.38 in income from the sales of arts and crafts from January 1 to July 7, 1986. The IHO's "evaluation" is very similar to the *Begay* case where he "expressed doubt that a Mormon business owner would break the law and forego tax deductions for employee wages." *Begay* at page 6. The *Begay* Court

held, "The Hearing Officer made assumptions about payment practices on which he had no evidence." *Begay* at 7. Similarly, the IHO in this case made assumptions based on his own speculation as to the impossibility of the Kachina manufacturing process without any evidence in the record. The IHO failed to provide specific and cogent reasons for his adverse credibility findings which makes his decision arbitrary and capricious. *Gui* at 1227. He bases his credibility findings on his own speculation and does not rely on a scintilla of evidence in the record, which means his decision is not based on substantial evidence. *Kappos.* The IHO's decision is arbitrary and capricious and not based on substantial evidence.

IV. CONCLUSION

For the reasons stated in this motion and based on the administrative record, the IHO's decision denying Ms. George benefits should be reversed and overruled.

Respectfully submitted this 11th day of October 2018.

HINKLE SHANOR LLP

By: *s/ S. Barry Paisner*
S. Barry Paisner
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on 11th day of October, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and served a copy of the attached document through the CM/ECF System to all counsel of record.

s/ S. Barry Paisner
Attorney for Plaintiff