IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRANKLIN J. MORRIS, as Personal Representative of the Wrongful Death Estate of MARCELLINO MORRIS, JR., (Deceased),

Plaintiff,

vs. No. 1:15-cv-00055-JCH-LF

GIANT FOUR CORNERS, INC. d/b/a GIANT #7251 and ANDY RAY DENNY, an Individual,

Defendants.

DEFENDANT'S OPPOSED MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff seeks to hold Defendant Giant Four Corners liable for the negligent sale of gasoline to an allegedly intoxicated driver. Plaintiff's claim is without merit because under New Mexico law, Giant did not owe a duty of care to the decedent to refrain from selling gasoline to an intoxicated person. In the absence of a legally cognizable duty, Plaintiff's cause of action for negligent entrustment fails as a matter of law, and the Court should dismiss Plaintiff's complaint.

As proscribed by the Supreme Court of New Mexico, the test for imposition of a legal duty is not the foreseeability of harm, but rather whether existing statutes, case law or legal principles mandate a duty of care. Here, none of those factors exist:

- No New Mexico statute imposes a duty on Giant to not sell gasoline to an intoxicated individual;
- No New Mexico appellate court opinion imposes a duty on Giant to not sell gasoline to an intoxicated individual;

- The relevant policy considerations mitigate against imposing a duty on vendors not to sell gasoline to an intoxicated individual.

Accordingly, the Court should grant Giant's Motion for Judgment on the Pleadings.

I. JUDGMENT ON THE PLEADINGS IS PROPER.

A. Legal Standard Governing Judgment on the Pleadings

"After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The same standards that govern a motion to dismiss under Rule 12(b)(6) also govern a motion for judgment on the pleadings under Rule 12(c). *See Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004). Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The sufficiency of a complaint is a question of law, and when considering a Rule 12(b)(6) motion, a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *See Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010); *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). A "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

II. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM FOR NEGLIGENT ENTRUSTMENT

Plaintiff's claim against Giant is for the negligent entrustment of gasoline to an intoxicated driver. (*See* Compl. [Doc. 1-1] ¶¶ 44-57; Pl.'s Mot. for Partial Summ. J. on Negligent Entrustment [Doc. 43].) Even accepting the factual allegations set forth in the

complaint, Plaintiff's claim fails as a matter of law because Giant did not owe a duty of care to the decedent. In the absence of a legally cognizable duty, Plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed.

A. Plaintiff's Claim for Negligent Entrustment Requires the Existence of a Legal Duty.

Relying on the Restatement (Second) of Torts, New Mexico courts have recognized the theory of negligent entrustment of a chattel. "General principles of negligence are relevant to the determination of negligent entrustment." *McCarson v. Foreman*, 1984-NMCA-129, ¶ 13, 692 P.2d 537. "Generally, a negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based on a standard of reasonable care, and the breach being a cause-in-fact of the plaintiff's damages." *Coffey v. United States*, 870 F. Supp. 2d 1202, 1225 (D.N.M. 2012) (Browning, J.) (citing *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 73 P.3d 181). "A finding of negligence . . . is dependent upon the existence of a duty on the part of the defendant. *Schear v. Bd. of Cty Comm'rs*, 1984-NMSC-079, ¶ 4, 687 P.2d 728 (citation omitted); *see Paez v. Burlington N. Santa Fe Ry.*, 2015-NMCA-112, ¶ 9, 362 P.3d 116 ("It is axiomatic that a negligence action requires that there be a duty owed from the defendant to the plaintiff"); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶ 13, 750 P.2d 118 ("[N]egligence contemplates a legal duty owing from one party to another").

B. Legal Standard Imposed by New Mexico Courts for Determining the Existence of Duty

"Whether the defendant owes a duty to the plaintiff, is a legal question for the courts to decide." *Lujan v. N.M. Dept. of Transp.*, 2015-NMSC-005, ¶ 8, 341 P.3d 1. "Duty . . . defines the legal obligations of one party toward another and limits the reach of potential liability." *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 8 n.1, 792 P.2d 36. "Ultimately, a duty exists only if the obligation of the defendant is one to which the law will give recognition and effect. In other

words, a duty establishes the legally recognized obligation of the defendant to the plaintiff." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 9, 73 P.3d 181 (internal quotation marks & citation omitted). Only after the courts recognize that a duty exists is there "a legal obligation to conform to a certain standard of conduct to reduce the risk of harm to an individual or class of persons." *Baxter v. Noce*, 1988-NMSC-024, ¶ 11, 51, 752 P.2d 240.

In 2014, the New Mexico Supreme Court made clear that New Mexico no longer defines duty in terms of foreseeability. *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2014-NMSC-014, 326 P.3d 465. Instead, the Court held that courts must articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant owes a duty. This pronouncement significantly changed the long-standing approach under New Mexico law.

Before that holding, "New Mexico . . . adopted and applied for decades the majority view of *Palsgraf [v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928),] that a negligent actor only owes a duty to those whose injuries are a foreseeable result of the negligence." *Herrera*, 2003-NMSC-018, ¶ 20. "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." *Ramirez v. Armstrong*, 1983-NMSC-104, ¶ 9, 673 P.2d 822. Over time, New Mexico's appellate courts moved away from an exclusive reliance on foreseeability as the touchstone for legal duty, finding instead that "the foreseeability of harm to the plaintiff should be but one factor in determining the existence of a duty, and not always conclusive." *Solon v. WEK Drilling Co.*, 1992-NMSC-023, ¶ 12, 829 P.2d 645 (quoting W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 288 (5th ed. 1984).) In *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 18, 241 P.3d 1086, the New Mexico Supreme Court cited to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 cmt. j (2010) as authority for "disapproving the use of foreseeability to limit liability in preference for 'articulat[ing] polic[ies] or principle[s] . . . to facilitate more transparent

explanations of the reasons for a no-duty [or limited-duty] ruling and to protect the traditional function of the jury as factfinder.'" Under this formulation, "duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law." *Id.* (quoting *Herrera*, 2003-NMSC-018, ¶ 7.)

Four years ago in *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2014-NMSC-014, ¶ 1, 326 P.3d 465, the New Mexico Supreme Court fixed this doctrine as an essential part of New Mexico law:

> We clarify and expressly hold that foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases. We reaffirm our adoption of Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 comment j (2010), and require courts to articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited. Foreseeability is a fact-intensive inquiry relevant only to breach of duty and legal cause considerations. What may not be foreseeable under one set of facts may be foreseeable under a slightly different set of facts. Therefore, foreseeability cannot be a policy argument because foreseeability is not susceptible to a categorical analysis.

(internal citations omitted). The court's rationale relied on the principle that "[f]oreseeability and breach are questions that a jury considers when it decides whether a defendant acted reasonably under the circumstances of a case or legally caused injury to a particular plaintiff." *Id.* ¶ 4. "[S]uch determinations require the jury's common sense, common experience, and its consideration of community behavioral norms." *Id.* ¶ 22. In contrast, "[f]oreseeability considerations should not be used by a judge to determine the scope of duty, because not even the most experienced judge is capable of anticipating all possible facts that might affect future foreseeability determinations in similar cases." *Id.* ¶ 9. "Instead, courts must articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant does or does not have a duty or that an existing duty should be limited." *Id.* ¶ 25. The court overruled all earlier case law which may be in conflict with its holding in *Rodriguez*. *Id.* ¶ 3.

C. Giant's Alleged Duty Does Not Exist as a Matter of Law

Notwithstanding the New Mexico Supreme Court's purge of foreseeability from the determination of duty in *Rodriguez*, Plaintiff's description of Giant's alleged duty in the present case is couched solely in those terms:

> GIANT owed a duty of reasonable care to the motoring public, including Decedent Morris, and which duty included, without limitation, to refrain from selling of supplying gasoline to an intoxicated person when it is foreseeable that the intoxicated person is driving a vehicle or needs the gasoline to start an immobile vehicle.

(Compl. [Doc. 1-1] ¶ 47.) Rather than evaluate Giant's alleged duty in terms of foreseeability considerations – as Plaintiff asserted in his complaint – this Court must "undertake an analysis of the policy considerations and interests involved without regard to whether the injury sustained by Plaintiff was foreseeable." *Brown v. Kellogg*, 2015-NMCA-006, ¶ 7, 340 P.3d 1274. The "question of policy [is] to be answered by reference to legal precedent, statutes, and other principles of law." *Oakey v. May Maple Pharm., Inc.*, 2017-NMCA-054, ¶ 22, 399 P.3d 939 (internal quotation marks & citations omitted). Under this standard, New Mexico law does not impose a duty of care on gasoline vendors to refrain from selling gasoline to an intoxicated person. In the absence of this duty, Plaintiff failed to state a viable claim for negligent entrustment.

1. There is no legal precedent to support a policy that gasoline vendors have a duty not to sell gasoline to an intoxicated person.

In the specific context of the present case, there is no reported New Mexico appellate decision which holds that a commercial vendor has a duty to not sell gasoline to an intoxicated person. The absence of such a holding should give this Court significant pause in deciding whether to expand New Mexico state law in order to recognize the purported legal duty on which Plaintiff relies, as "it is not a federal court's place to expand . . . state law beyond the bounds set

by the [highest court of the state.]" *Amparan v. Lake Powell Car Rental Companies*, 882 F.3d 943, 948 (10th Cir. 2018) (quoting *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1295 (10th Cir. 2017)).

This conclusion is consistent with the general rule that there is no duty to control a third person's conduct so as to prevent personal harm to another. *See* Restatement (Second) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *see Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 14, 145 P.3d 76 (recognizing Restatement).

The only exception to this principle is if a "special relationship" exists either between the actor and the third person or between the actor and the person injured. In this regard, New Mexico follows the guidelines set forth in the Restatement (Second) of Torts, § 315 (1965):

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Estate of Haar v. Ulwelling, 2007-NMCA-032, ¶ 20, 154 P.3d 67.

Here, there is no such special relationship. Plaintiff seeks to impose a duty owed by a vendor "to the motoring public." (Compl. [Doc. 1-1] ¶ 47.) But there is no relationship of any kind between a vendor and unknown members of the general public. These individuals have no connection whatsoever to the vendor: they are not customers, they are not tenants or business invitees, they are not employees or agents, and they are not licensees. *See* Restatement (Second) of Torts §§ 314A, 316-319 (1965) (stating examples of "special relationships" that give rise to an exception to the general rule that a person has no duty to control the actions of a third party); *see*

also Chavez v. Torres, 1999-NMCA-133, ¶ 20, 991 P.2d 1 (additional examples). "[I]n order to create a duty based on a special relationship, the relationship must include the right or ability to control another's conduct." *Thompson v. Potter*, 2012-NMCA-014, ¶ 27, 268 P.3d 57 (internal quotation marks & citation omitted). Without the requisite and recognized special relationship, a vendor owes no duty "to the motoring public" to protect them from harm. *See Rummel v. Edgemont Realty Partners, Ltd.*, 1993-NMCA-085, 859 P.2d 491 (affirming dismissal of complaint given the absence of a special relationship between the defendant and the plaintiff giving rise to a legal duty by the defendant to protect the plaintiff from the criminal acts of third parties).

Similarly, there is no cognizable "special relationship" between a vendor and an intoxicated customer "which imposes a duty upon the actor to control the third person's conduct." Other than in the limited circumstance of dramshop liability, New Mexico has not imposed a duty on a business owner to control the conduct of its customers after they leave the premises.[1] The imposition of such a duty runs directly counter to the clear line of New Mexico holdings to the effect that, "[t]o impose a duty, a relationship must exist that legally obligates Defendant to protect Plaintiff's interest," and in the absence of such a relationship, "there exists no general duty to protect others from harm." *Johnstone*, 2006-NMCA-119, ¶ 7.

[1] The New Mexico Supreme Court explained in *Baxter v. Noce*, 1988-NMSC-024, ¶ 4, 752 P.2d 240, "[i]n *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982), we . . . held that a third-party who is injured by an intoxicated driver has a cause of action against the tavernkeeper who illegally has served alcohol to the intoxicated driver. We . . . concluded that the existence of a duty is established by showing violation of a state regulation that prohibited sale of alcoholic beverages to intoxicated persons." As shown in Part II(C)(2), *infra*, there is no similar state regulation barring the sale of gasoline to intoxicated persons.

2. There is no statutory basis in favor of a policy that gasoline vendors have a duty not to sell gasoline to an intoxicated person.

Just as there are no New Mexico cases that hold that a commercial vendor has a duty to not sell gasoline to an intoxicated customer, the New Mexico legislature similarly has declined to impose any such duty. As a matter of policy, the legislative branch has chosen not to enact any statutory pronouncements in this area.

There is no statute or administrative regulation that prohibits the sale of gasoline to an intoxicated person. In fact, there is no New Mexico statute or regulation that constrains who may purchase gasoline from a retail vendor. Outside of the sale of alcohol, the only legislative prohibition on the sale of chattels to an intoxicated person is found in the Fireworks Licensing and Safety Act, which makes it "unlawful to offer for sale or to sell fireworks to children under the age of sixteen years or to an intoxicated person." NMSA 1978, § 60-2C-8(C) (1989); *see also* 15.1.10.9(B) NMAC (promulgated 01/09/16) ("[P]ermitting persons who are obviously intoxicated to participate in gaming" is an "unsuitable method[] of operation" by a gaming establishment). Clearly, the legislature knows how to restrict the sale of certain items to intoxicated individuals. The absence of a similar provision with regard to the sale of gasoline confirms that the legislature does not intend to restrict such transactions. *See Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 10, 685 P.2d 396 (recognizing that "the Legislature knows how to create a private remedy if it intends to do so [and b]y negative inference, the Legislature's failure to provide for a private action suggests that it did not intend to create one"), *superseded by statute on other grounds as stated in Journal Publ'g Co. v. Am. Home Assurance Co.*, 771 F. Supp. 632, 635 (S.D.N.Y. 1991).

Contrary to the stark absence of a statute restricting the sale of gasoline to an intoxicated person, the legislature has enacted extensive prohibitions relating to the sale of alcohol to an

intoxicated person. In New Mexico, it is unlawful "for a person to sell or serve alcoholic beverages to or to procure or aid in the procurement of alcoholic beverages for an intoxicated person if the person selling, serving, procuring or aiding in procurement, knows or has reason to know that he is selling, serving, procuring or aiding in procurement of alcoholic beverages for a person that is intoxicated." NMSA 1978, § 60-7A-16 (1981). The legislature has further refined the imposition of liability for providing alcohol based on varying relationships between plaintiffs and defendants:

> For a suit by an injured third party against a licensee, the plaintiff must show that the licensee was negligent—that it was "reasonably apparent" that the person being served was intoxicated. Section 41-11-1(A)(2). For a suit against a licensee by a patron, the plaintiff must show "gross negligence and reckless disregard for the safety of the person who purchased or was served the alcoholic beverages." Section 41-11-1(B). For a suit against a gratuitous provider, or social host, the plaintiff must show that the host provided alcoholic beverages "recklessly in disregard of the rights of others, including the social guest." Section 41-11-1(E).

Delfino v. Griffo, 2011-NMSC-015, ¶ 13, 257 P.3d 917. In the more than thirty years since the New Mexico Legislature passed the Liquor Liability Act, it has not enacted any comparable legislation barring the sale of gasoline to intoxicated persons.

Finally, the legislature has made it a crime "for a person who is under the influence of intoxicating liquor to drive any vehicle within this state." NMSA 1978, § 66-8-102(A). Similarly, it is illegal "for a person who is under the influence of intoxicating liquor to operate a motorboat," *id.* § 66-13-3(A) (2003), and "for any person, while clearly intoxicated as a result of drinking alcoholic liquors . . . to hunt, kill or attempt to take in any manner any game or nongame mammal or bird." *Id.* § 17-2-29. But just as there is no law curtailing the sale of gasoline to an intoxicated person who then may drive an automobile, there is no legislation prohibiting the sale of gasoline to an intoxicated person who may operate a motorboat, nor is there a provision outlawing the sale of ammunition to an intoxicated would-be hunter. The

absence of these statutes makes clear that the legislature does not equate the sale of gasoline to intoxicated persons with the sale of alcohol to the same class of individuals.

3. There are no other principles of law that sustain a policy of finding that gasoline vendors have a duty not to sell gasoline to an intoxicated person.

As noted above, there are no precedential or statutory grounds for supporting a policy outlawing the sale of gasoline to an intoxicated person. There also are no other policy rationales to compel judicial recognition of this novel form of duty. The New Mexico Supreme Court has held that, in determining whether a duty exists, "[c]ourts should not engage in weighing evidence to determine whether a duty of care exists or should be expanded or contracted—weighing evidence is the providence of the jury; instead, courts should focus on policy considerations when determining the scope or existence of a duty of care." *Rodriguez*, 2014-NMSC-014, ¶ 19.

New Mexico has an interest in preventing automobile accidents involving drunk drivers. But the State's response to the danger caused by automobiles driven by an intoxicated driver has been to punish the intoxicated driver and to hold responsible the person who provided the alcohol to the inebriated vehicle operator. There has been no effort to regulate the sale of gasoline to an intoxicated person.[2] There also is no rational basis for imposing a legal duty on vendors who sell gasoline to intoxicated persons and not sellers of other chattels (such as tires or oil), roadside assistance, or even the automobile itself – all of which may be equally as necessary

[2] In its Memorandum Opinion and Order Denying Plaintiff's Motion for Partial Summary Judgment [Doc. 79], this Court noted that after Andy Denny picked up Cecilia Yazzie, "Denny and Yazzie provide conflicting testimony about who then drove Denny's vehicle – Denny stated that Yazzie drove throughout the time they were together, while Yazzie explained that Denny drove at all times she was with him." (*Id.* at 2 (citing Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. on Negligent Entrustment [Doc. 48-2]).) Plaintiff's claim against Giant is for the negligent entrustment of gasoline to an intoxicated driver. (*See* Compl. [Doc. 1-1] ¶¶ 44-57; Pl.'s Mot. for Partial Summ. J. on Negligent Entrustment [Doc. 43].) If Denny was not the driver of the vehicle at the time of the purchase, then the premise for Plaintiff's asserted duty does not exist, and Giant cannot be found liable for negligent entrustment.

for an intoxicated person to drive a car. None of those vendors are required to assess and determine the sobriety of their customers.

In a similar vein, there is no cogent policy for imposing a duty solely on vendors who sell gasoline to intoxicated drivers and not on vendors of other nonalcoholic chattels that are more directly responsible for distracting drivers and causing accidents. A significant number of car accidents are caused by drivers distracted by their cell phones while they drive. *See generally* https://www.cdc.gov/motorvehiclesafety/distracted_driving/index.html. Yet courts have held that companies that provide cell phones do not owe a duty to a person injured in an accident caused by a driver using that device. In *Williams v. Cingular Wireless*, 809 N.E.2d 473 (Ind. Ct. App. 2004), for example, the court held that as a matter of public policy, Cingular Wireless did not have such a duty. In affirming the trial court's dismissal of a complaint, the appellate court explained that

> imposing a duty on Cingular and similar companies to prevent car accidents such as the one in this case would effectively require the companies to stop selling cellular phones entirely because the companies have no way of preventing customers from using the phones while driving. Doing so would place a higher burden on those companies than on other types of manufacturers or sellers of products that might be distracting to drivers. Ultimately, sound public policy dictates that the responsibility for negligent driving should fall on the driver.

Id. at 479.

To impose a duty on a gas station to refrain from selling gasoline to an intoxicated person would open the floodgates for lawsuits against drive-thru fast food restaurants for accidents caused when a driver gets distracted with eating while driving; hot beverage providers for accidents caused when a driver becomes preoccupied with spillage or drinking while driving; or drug stores that sell cosmetics for accidents caused when a driver is inattentive when applying makeup while driving. Similar liability would apply to providers of maps, books, car stereos – virtually any object in a car that is capable of causing distraction. The limitless number of

potential vendors and chattels that would be swept into such an expansive doctrine weighs heavily against a court recognizing the duty pled by Plaintiff. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 cmt. f (2010) (appropriate to adopt a no-duty rule where "[c]ourts may have difficulty . . . drawing doctrinal lines necessary to adjudicate certain categories of cases"); *see also Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F. Supp. 2d 742, 749 (W.D.N.C. 2011) ("If manufacturers or designers of products had a legal duty to third parties to anticipate improper use of their products then no product that would potentially distract a driver could be marketed. Cellular telephones, GPS devices and even car radios would be the subject of suits such as this one").

III. CONCLUSION

In order for Plaintiff to proceed on his claim of negligent entrustment, Giant must owe a legally cognizable duty of care to the decedent. In this case, no such duty exists as a matter of law. As a result, because Plaintiff's complaint fails to state a claim upon which relief can be granted, Giant is entitled to judgment on the pleadings.

Pursuant to D.N.M.LR-Civ. 7.1(a), Defendant's counsel conferred in good faith with opposing counsel, who opposes this motion.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 21, 2018, the foregoing *Defendant's Opposed Motion for Judgment on the Pleadings* was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record:

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