UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case No. 17-3708

Enerplus Resources (USA) Corporation, Plaintiff-Appellee,	)
vs.	)
Wilbur D. Wilkinson, an individual; The Three Affiliated Tribes, Fort Berthold District Court, Reed A. Soderstrom, agent for Wilbur D. Wilkinson; and Ervin J. Lee, an individual, Defendants-Appellants.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA,
(THE HONORABLE DANIEL L. HOVLAND)
DISTRICT COURT CASE NO. 1:16-CV-00103

BRIEF OF APPELLEE, ENERPLUS RESOURCES (USA) CORPORATION

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SUMMARY OF THE CASE AND ORAL ARGUMENT

Plaintiff Enerplus Resources (USA) Corporation ("Enerplus") brought suit to recover approximately $2.9 million in overpayments to Wilbur D. Wilkinson ("Mr. Wilkinson") on an overriding royalty interest ("ORRI") paid in connection with a Settlement Agreement between, among others, Mr. Wilkinson and Peak North Dakota, LLC ("Peak North"). After the settlement, Enerplus acquired 100% of the membership interests in Peak North and subsequently merged Peak North into Enerplus. Enerplus made the ORRI payments to Mr. Wilkinson's attorney, Reed Soderstrom ("Mr. Soderstrom"), in trust for Mr. Wilkinson.

When Enerplus discovered that it overpaid the royalties, it notified Messrs. Wilkinson and Soderstrom and requested the return of the overpayment. They refused, and Mr. Wilkinson filed suit against Enerplus in Three Affiliated Tribes Fort Berthold Reservation District Court ("Tribal Court"), claiming the money belonged to him. Pursuant to the forum selection clauses in the parties' agreements, Enerplus filed the action below. The district court awarded summary judgment in favor of Enerplus, holding that it was entitled to a return of the overpayment and awarding Enerplus its costs and fees under a contractual fee-shifting provision. Contrary to Mr. Wilkinson's arguments, there are no material facts in dispute and summary judgment was proper.

Enerplus does not believe that oral argument would be helpful to the Court.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1A of the Eighth Circuit's Local Rules, Enerplus states as follows:

1. Enerplus Resources (USA) Corporation is wholly-owned by Enerplus Corporation, a Canadian corporation publicly traded on the Toronto Stock Exchange (ERF.TO) and the New York Stock Exchange (ERF.NYSE).

2. Enerplus Corporation, a Canadian corporation, owns 100% of Enerplus Resources (USA) Corporation's stock.

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JURISDICTIONAL STATEMENT

Jurisdiction in the district court was based on diversity under 28 U.S.C. § 1332(a). There is complete diversity of citizenship between Enerplus, a Delaware corporation with its principal place of business in Colorado, and Defendants Mr. Wilkinson, Mr. Soderstrom, the Tribal Court, and Mr. Lee, all of whom are citizens of North Dakota. Furthermore, the amount in controversy exceeds $75,000 exclusive of interest and costs.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which provides for jurisdiction over a final judgment from a U.S. District Court.

The district court's Order granting Enerplus's first Motion for Summary Judgment was entered on February 23, 2017. The Order granting Enerplus's second Motion for Summary Judgment was entered on November 2, 2017. The district court denied Mr. Wilkinson's Motion for Reconsideration on December 12, 2017, and entered judgment the same day.

Wilkinson filed his Amended Notice of Appeal on December 15, 2017.

STATEMENT OF THE ISSUES

1. Are there disputed issues of material fact concerning (i) Enerplus's standing to bring claims against Mr. Wilkinson, and (ii) the percentage of overriding royalty interest that Mr. Wilkinson is entitled to, such that the district court erred by entering judgment in favor of Enerplus?

- *8 Delaware Code § 259(a)*
- *N.D. Cent. Code Ann. § 10-19.1-102(2)*
- *Drake v. Scott, 812 F.2d 395 (8th Cir. 1987)*
- *Wiser v. Wayne Farms, 411 F.3d 923 (8th Cir. 2005)*

2. Did the district court abuse its discretion when it denied Wilkinson's motion for reconsideration?

- *K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009 (8th Cir. 2007)*

STATEMENT OF THE CASE

Mr. Wilkinson and Peak North Dakota, LLC ("Peak North"), among others, entered a Settlement Agreement, Full Mutual Release, Waiver of Claims and Covenant Not to Sue (the "Settlement Agreement") on October 4, 2010. Appendix of Appellants ("App."), pp. 046-139. In the Settlement Agreement, Peak North agreed to assign to Mr. Wilkinson a 0.5% of 8/8ths overriding royalty interest ("ORRI") in certain oil and gas leases in North Dakota located on allotted Indian lands and within the exterior boundaries of the Fort Berthold Indian Reservation. App. pp. 049-051. Ten percent of Mr. Wilkinson's overriding royalty interest was assigned to his attorney at the time, Mr. Lee. *Id.*

Pursuant to the Settlement Agreement, Peak North and Messrs. Wilkinson and Lee executed an Assignment of Overriding Royalty Interest ("ORRI Assignment") dated October 4, 2010 by which Mr. Wilkinson received an 0.45% of 8/8ths overriding royalty interest and Mr. Lee received an 0.05% of 8/8ths overriding royalty interest in oil and gas leases on lands located within the exterior boundaries of the Fort Berthold Indian Reservation. Appendix of Appellee ("Aplle. App."), pp. 15-30. In conjunction with the Settlement Agreement and ORRI Assignment, Messrs. Lee and Wilkinson also executed "Division Orders," dated October 4, 2010. Aplle. App. pp. 31-48.[1]

[1] The Settlement Agreement, ORRI Assignment, and Division Orders all have forum selection agreements stating that any disputes arising under the contracts and/or the

In December of 2010, Enerplus acquired 100% of the membership interests in Peak North and subsequently merged the two entities with Enerplus remaining the surviving entity. Aplle. App. pp. 49-51.

Between August 2014 and October 2015, due to a clerical error, Enerplus overpaid the overriding royalties due to Messrs. Wilkinson and Lee by $2,961,511.15. Aplle. App. pp. 129-135. The payments were made to Mr. Soderstrom in trust for Messrs. Wilkinson and Lee. *Id.* Enerplus demanded that the money be returned. *Id.* In response, Mr. Wilkinson filed suit against Enerplus in Tribal Court, asserting that the money belonged to him and seeking an accounting. App. pp. 040-043.

Because Messrs. Wilkinson and Soderstrom (collectively, "Wilkinson") refused to return the overpayment, Enerplus brought this action. Aplle. App. pp. 1-14. Enerplus sought a preliminary injunction prohibiting Mr. Wilkinson from litigating any disputes related to the Settlement Agreement, ORRI Assignment, and/or Division Orders in Tribal Court, and requiring the excess money to be deposited with the court. Aplle. App. pp. 52-63. In opposition to Enerplus's motion, Wilkinson argued, among other things, that the Settlement Agreement is void because Enerplus failed to get approval from the Secretary of the Interior regarding

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transactions contemplated by the contracts be resolved in either State Court or Federal Court in North Dakota. App. pp. 054-055; Aplle. App. pp. 16, 32, 41.

an "assignment" of the underlying leases from Peak North to Enerplus. Aplle. App. pp. 68-69.

The district court rejected Wilkinson's arguments and granted the preliminary injunction. Aplle. App. pp. 98-109. Wilkinson appealed.[2] The district court denied Wilkinson's request for a stay pending appeal, and Mr. Soderstrom deposited the excess monies into the Court. Aplle. App. pp. 110-112.

Enerplus then moved for summary judgment seeking a determination that it was entitled to return of the overpayment. Aplle. App. pp. 119-128. In response, Wilkinson again challenged Enerplus's standing to bring this action, arguing that Enerplus failed to prove a "valid conveyance" of Peak North's interests in the underlying leases that are the subject of the Settlement Agreement, ORRI Assignment, and Division Orders. App. pp. 149-154. Wilkinson submitted no evidence in support of his argument. *Id.* On February 23, 2017, the district court granted Enerplus's motion, finding that Peak North merged into Enerplus and therefore Enerplus had standing to bring its claims against Wilkinson. Aplle. App. pp. 164-172.

On August 2, 2017, this Court affirmed the grant of a preliminary injunction. Addendum of Appellee, pp. 1-7. The panel rejected Wilkinson's

[2] On appeal, Wilkinson began couching his argument regarding approval of assignment of the leases in terms of "standing." App. pp. 198-199.

argument that Enerplus lacks standing to bring this action. *Id.* at p. 7. The panel found that Wilkinson failed to allege that any assignment actually occurred, and even if it had, he failed to show that it would have voided the underlying leases or invalidated the Settlement Agreement. *Id.*

In the district court, Enerplus filed a second motion for summary judgment, seeking to permanently enjoin Wilkinson from pursuing any claims related to the Settlement Agreement, ORRI Assignment, or Division Orders in Tribal Court, and to permanently enjoin the Tribal Court from exercising jurisdiction over such matters. App. pp. 168-181. Enerplus also sought an award of its fees and costs pursuant to a fee-shifting provision in the Settlement Agreement and Division Orders. *Id.* On November 2, 2017, the district court granted the motion and awarded Enerplus its attorney fees and costs. App. pp. 013-024.

Wilkinson filed a motion for reconsideration seeking relief from the November 2, 2017 Order. App. pp. 155-161. In that motion, Wilkinson argued for the first time that the "Fort Berthold Indian Reservation has a law prohibiting the assignment of oil and gas leases" and that Enerplus's refusal to provide an accounting or prove its assignment from Peak North is in violation of Resolution No. 08-87-VJB. App. pp. 159-160. He asked that the district court consider the Resolution and deny Enerplus's motion for summary judgment. *Id.*

The district court denied the motion for reconsideration on December 12,

2017, and entered judgment the same day. App. pp. 025-039; Addendum of Appellants, pp. 028-029. The district court found that Wilkinson failed to raise any meritorious arguments warranting reconsideration. App. pp. 030-031.

Wilkinson now appeals the district court's entry of judgment in favor of Enerplus and the denial of his motion for reconsideration.

SUMMARY OF THE ARGUMENT

Wilkinson contends that the district court improperly entered judgment in favor of Enerplus because there are material facts in dispute. He contends — yet again — that Enerplus lacks standing to bring this action, arguing that Enerplus has failed to produce an approval of an assignment of the leases from Peak North to Enerplus. This argument has been addressed and rejected numerous times by both this Court and the district court. There are simply no disputed issues of material fact regarding Enerplus's standing to seek return of the overpayment.

Next, Wilkinson contends that there are disputed issues of fact concerning the percentage of ORRI he is entitled to under the Settlement Agreement. This issue is raised for the first time on appeal and should not be considered by this Court. Further, there are no disputed facts concerning the amount of the overpayment or the amount that Wilkinson is entitled to under the Settlement Agreement.

Finally, Wilkinson contends that the district court abused its discretion by denying his motion for reconsideration and failing to consider the Three Affiliated Tribes Resolution 08-87-VJB. However, the district court did consider the argument and correctly found that it had no merit. Thus, it properly denied Wilkinson's motion for reconsideration.

For the forgoing reasons, the judgment in favor of Enerplus and the December 12, 2017 Order denying the motion for reconsideration should be affirmed.

ARGUMENT

I. BECAUSE THERE ARE NO GENUINE DISPUTES OF MATERIAL FACT, ENERPLUS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Wilkinson contends that the district court erred by entering judgment in favor of Enerplus despite the existence of disputed issues of material fact concerning (i) Enerplus's standing to bring this action, and (ii) the percentage of the ORRI that Wilkinson is entitled to under the Settlement Agreement. Contrary to Wilkinson's assertions, there simply are no disputed issues of material fact in this case that would preclude entry of summary judgment as a matter of law.[3]

A. *Standard of Review*

This Court reviews de novo a grant of summary judgment. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011). Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. *Ricci v. DeStefano*, 129 S.Ct.

[3] Wilkinson asserts that discovery has not been "adequately conducted." Brief of Appellants ("Brief"), p. 9. This statement is misleading. As indicated by the Scheduling Order and noted by the district court in its February 23, 2017 Order, fact discovery in this case was to be completed by January 31, 2017. Aplle. App. p. 113, 171. However, as the district court noted, Wilkinson "did not serve *any* discovery requests or deposition notices on [Enerplus] prior to the close of discovery." Aplle. App. p. 171 (emphasis added). Having failed to pursue discovery, any inadequacy in the course of discovery is attributable solely to Wilkinson's own conduct.

2658, 2677 (2009). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts," and must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Ricci*, 129 S.Ct. at 2677.

B. *Standing*

Wilkinson contends that Enerplus does not have standing to assert its claims. Brief, p. 7-8. Referencing no legal authority, Wilkinson argues that "[w]hether or not Enerplus has standing to bring suit is determined by whether there was a valid conveyance of the lease concerning Indian Lands." *Id.* He then concludes that Enerplus lacks standing because it has not proven that the Secretary of the Interior approved the lease assignments between Peak North and Enerplus or that the Secretary waived the approval requirement. *Id.* This argument fails for several reasons.

First, Enerplus has never alleged that Peak North "assigned" its interests to Enerplus or that the Secretary of the Interior "waived" approval of the assignment.[4]

[4] Indeed, it is only Wilkinson who repeatedly asserts the existence of an "assignment" and a "waiver" of the Secretary of the Interior's approval. Aplle. App. pp. 68-69, 151-152, 179-182; App. pp. 152-153, 158-160. Enerplus has never alleged the existence of either an assignment or a waiver, both of which would be contrary to the undisputed facts of this case. Aplle. App. pp. 1-14; 56, 86-87, 119-121, 143-147, 156-157, 160-161, 185-188; App. p. 171.

Indeed, Enerplus has always maintained that Peak North merged into Enerplus and, therefore, there was no assignment or conveyance of the underlying leases and nothing for the Secretary of the Interior to approve. Aplle. App. pp. 1-14; 56, 86-87, 119-121, 143-147, 156-157, 160-161, 185-188; App. p. 171.

It is undisputed that effective December 31, 2010, Enerplus and Peak North merged, with Enerplus remaining as the surviving entity. Aplle. App. pp. 49-51, 121. The district court found as much in its February 23, 2017 Order, citing to the Certificate of Merger. Aplle. App. p. 167, 49-51. The Certificate of Merger was submitted into the record by Wilkinson on at least two separate occasions.[5] App. p. 003 (docket entry 10-5), p. 008 (docket entry 67-1). Wilkinson never argued that the Certificate of Merger is insufficient to establish that Peak North merged into Enerplus nor did he submit any contrary evidence to dispute that the merger occurred. App. pp. 149-154.

As Enerplus argued in the district court, under both Delaware and North Dakota law, Enerplus is the statutory successor and legal equivalent to Peak North for purposes related to enforcing any rights or obligations under the Settlement Agreement or transactions contemplated therein. Aplle. App. 86-87, 186; *see* 8

[5] Although Wilkinson repeatedly complains that Enerplus has not provided a merger agreement (which, he has been told, does not exist), Wilkinson failed to serve any discovery requests on Enerplus or otherwise establish the significance of the merger agreement. Aplle. App. 171; 136-150; 139.

Delaware Code § 259(a) ("all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it"); *see also* N.D. Cent. Code Ann. § 10-19.1-102(2)(f) ("surviving organization is responsible and liable for all the liabilities and obligations of each of the constituent organizations").

Similarly, upon the merger Enerplus succeeded by operation of law to the property rights of Peak North. *See* 8 Delaware Code § 259(a) ("all property shall be vested in the corporation surviving or resulting from such merger; and all property and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation"); *see also* N.D. Cent. Code Ann. § 10-19.1-102(2)(e)(1) (when merger becomes effective, "[a]ll property and every other interest of each of the constituent organizations vests in the surviving organization *without any further act or deed*") (emphasis added).

Thus, the merger obviated any need for an assignment of any lease or other assets, so there is no basis for Wilkinson's assumption or argument that Enerplus has no standing to rely on the Settlement Agreement because an assignment occurred without the Secretary of the Interior's approval or "waiver." Indeed, the only fact

pertinent to Enerplus's standing is the fact that a merger occurred between Peak North and Enerplus, a fact Wilkinson does not dispute.

In sum, to establish its standing to enforce the terms of the Settlement Agreement, Enerplus only had to show that it merged with Peak North. Enerplus produced the Certificate of Merger to Wilkinson, and Wilkinson does not dispute that fact. As a result, Enerplus acquired Peak North's interests by operation of law. The Certificate of Merger is not an assignment document and in fact negates any need for an assignment as a matter of law. There being no assignment or conveyance, there is nothing that the Secretary of the Interior was required to approve. Thus, there are no disputed facts related to Enerplus's standing.

Finally, Wilkinson has made — and lost — the same argument, nearly verbatim, in his appeal of the preliminary injunction. Addendum of Appellee, pp. 1-7 (*Enerplus Resources (USA) Corp. v. Wilkinson*, 865 F.3d 1094 (8th Cir. 2017)). In that case, Wilkinson argued that "[w]hen Peak North merged with Enerplus, the assignment of the Indian lands and minerals needed to be approved by the Secretary of the Interior" and that absent such approval, the transaction was "suspect." App. pp. 198-199. This Court found that although Wilkinson argued that any assignment from Peak North to Enerplus did not follow the terms of the underlying leases, he did not allege that any assignment actually occurred. Addendum of Appellee, p. 7. Further, it found that even if an assignment had occurred, Wilkinson failed to show

that it would void the underlying lease or invalidate the Settlement Agreement, instead claiming that the transaction was merely "suspect." *Id.*

Here, Wilkinson continues the make the same incorrect and unsupported assertions. He points to no record evidence of an assignment or conveyance between Peak North and Enerplus that would create a disputed issue of fact. Nor does he show how an assignment in violation of the terms of the underlying leases would void or invalidate the Settlement Agreement. Instead, he simply claims that Enerplus's failure to produce either an approval or waiver from the Secretary of the Interior "makes Enerplus's standing in this matter specious at best." Brief, p. 8. The Court should reject this argument again. *See, e.g., Drake v. Scott*, 812 F.2d 395, 400 (8th Cir. 1987) ("One panel of this Court is not at liberty to disregard a precedent handed down by another panel.")

C. *Percentage of the ORRI and Overpayment*

Wilkinson contends — for the first time on appeal — that there are disputed issues of material fact concerning "whether there was actually an overpayment or underpayment." Brief, p. 9. This Court should not consider this argument. *See, e.g., Wever v. Lincoln County, Nebraska*, 388 F.3d 601, 608 (8th Cir. 2004) (court of appeals will not consider arguments raised for the first time on appeal). Indeed, in the case below Wilkinson took a contrary position where he acknowledged that the overpayment had occurred, but insisted that he was entitled to keep it. App. pp.

149-154, 159-159; Aplle. App. pp. 64-81, 178-184. Wilkinson's change in position provides even more reason for this Court to decline to consider this argument on appeal. *See Wiser v. Wayne Farms*, 411 F.3d 923, 926 (8th Cir. 2005) (the rule that the court of appeals will not address arguments raised for the first time on appeal applies even more forcefully when the appellant took the opposite position in district court).

In the event the Court considers the argument, there are simply no disputed issues of fact related to the overpayment. Enerplus provided sworn affidavit testimony explaining how the overpayment occurred and the exact amounts paid. Aplle. App. pp. 119-122; 129-135. Wilkinson presented no contrary evidence whatsoever in response. App. pp. 149-154. Although Wilkinson asserts that "[t]here has not yet been an accounting in this matter, nor has discovery been conducted towards this fact, so it is not clear whether an overpayment or underpayment occurred," Brief, p. 9, the fact is that Wilkinson had an opportunity to serve discovery on Enerplus and failed to do so. Aplle. App. p. 171. Moreover, Enerplus provided Wilkinson with documentation establishing the overpayments and the amount of each payment, which documents were submitted into the record in support of Enerplus's first motion for summary judgment. Apllee. App. pp. 129-135, 146. Wilkinson failed to offer any evidence at all, let alone contrary evidence.

Accordingly, because there are no genuine disputes of material fact, the

district court's entry of summary judgment in Enerplus's favor was proper and should be affirmed.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING WILKINSON'S MOTION FOR RECONSIDERATION.

In his third argument, Wilkinson makes the bare assertion that the district court failed to consider that Enerplus's refusal to provide an accounting or proof of its assignments from Peak North were in violation of the Fort Berthold Indian Reservation Resolution 08-87-VJB. Brief, p. 10. It is not clear from this assertion what facts or law Wilkinson's contention is based upon. Enerplus can only speculate that his argument is that the district court abused its discretion in denying his motion for reconsideration.

This Court reviews a district court's denial of a motion for reconsideration for abuse of discretion. *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1017 (8th Cir. 2007). Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 721 (8th Cir. 2010). Motions for reconsideration cannot be used to introduce new evidence that could have been produced while the motion was pending. *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 922 (8th Cir. 2015).

First, it appears from the district court's November 3, 2017 Order denying the motion for consideration that it *did* consider Wilkinson's arguments and found them to be without merit. App. pp. 030-031.

Further, the district court did not abuse its discretion in denying Wilkinson's motion. Wilkinson has made no attempt, either in this Court or in the district court below, to explain why he could not have presented this argument in his response to the motion for summary judgment. The Resolution is dated May 29, 2008, and therefore existed when the motion was pending. This is not a situation where there was newly discovered evidence or a change in the law. Thus, Wilkinson has failed to establish any basis for which a motion for reconsideration would be appropriate, let alone granted.

Finally, Wilkinson's argument is simply another iteration of his contention that Enerplus lacks standing for failure to obtain approval of an assignment, an argument that, again, incorrectly assumes that there was an assignment of the leases. As noted above, the district court and this Court have repeatedly addressed and rejected that argument. Even if one were to assume that there had been an assignment in violation of the Resolution, Wilkinson has made no attempt to show how such an assignment voided or invalidated the Settlement Agreement. Under these circumstances, the district court did not abuse its discretion in denying Wilkinson's motion for reconsideration.

CONCLUSION

For the foregoing reasons, this Court should affirm the entry of judgment in favor of Enerplus and the district court's December 12, 2017 Order denying Wilkinson's motion for reconsideration.

Dated this 7th of March, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) and typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman. The brief contains 3,937 words, excluding the parts of the brief exempt by Fed. R. App. 32(f).

The undersigned further certifies that this brief and addendum complies with Eighth Cir. R. 28A(h) and has been scanned for viruses and is virus free.

Dated the 7th day of March, 2018.

/s / Neal S. Cohen
Neal S. Cohen
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s / Maureen E. Carroll