The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, and PUYALLUP TRIBE OF INDIANS, and COMMUNITIES FOR A HEALTHY BAY, and PUGET SOUNDKEEPER ALLIANCE, Intervenor-Plaintiffs, vs. ELECTRON HYDRO, LLC, and THOM A. FISCHER, Defendants.	Case No. 2:20-cv-01746-JCC PUYALLUP TRIBE OF INDIANS' OBJECTION TO CONSENT DECREE

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INTRODUCTION AND BACKGROUND

The Puyallup Tribe of Indians (the "Tribe") objects to the proposed Consent Decree ("Decree"), as it is not fair, reasonable, or consistent with applicable law, and is not in the public interest.

The Tribe and its members have, from time immemorial, fished the waters of the Puyallup River (the "River") watershed and Puget Sound. Declaration of Chairman Sterud, originally filed Case No. 2:20-cv-01864-JCC ("ESA case"), Dkt. No. 51 ("Sterud Decl."), at ¶¶ 3, 5, 9, 10.[1] The Tribe's rights are reserved and protected by the Treaty of Medicine Creek, and the Tribe works to protect the fish in the Tribe's usual and accustomed fishing areas. Declaration of Russell Ladley, Dkt. No. 130-1 ("Ladley Decl.") at ¶ 6; Sterud Decl. at ¶¶ 6, 10. The Tribe's rights are essential to the Tribe and its members' existence and culture. Sterud Decl. at ¶¶ 8, 9.

In 2020, defendants began work in the River to replace Electron Dam's ("Dam") spillway and part of the wooden "apron" with an inflatable bladder dam. Dkt. No. 149 at 2. In July of 2020, defendants violated the Clean Water Act by discharging artificial turf, which included crumb rubber, and other materials, for which they did not have a Clean Water Act permit, into the River. *Id.* generally and at 7-9. Defendants knew artificial turf was not allowed under their permits and that the turf contained crumb rubber. Declaration of Mallory Voyk ("Voyk Decl.") submitted herewith at ¶¶ 8, 13-17; Declaration of Marisa Ordonia, Dkt. No. 130-3 ("Ordonia Decl."), Ex. K at 50:3-51:19, 55:5-57:7, 65:2-20, and 113:7-116:16. Shortly thereafter, the work failed and turf including crumb rubber containing the chemical 6PPD-q which is known to be

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[1] The Tribe submits with this Objection evidence the Tribe was prepared to present at a trial on the penalty phase and would submit at an evidentiary hearing on the Decree.

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highly toxic to salmonids, was discharged into the River spreading pollutants miles downstream. Dkt. No. 149 at 2; Dkt. No. 108, ¶¶ 62-64; Ordonia Decl., Ex. I at EH-USA005466 and Ex. G at 99:19-25.

Defendants failed to immediately report the discharge of pollutants, choosing to continue work in the River removing the diversion structure. Declaration of Russell Ladley in Support of Objection ("Ladley Decl. Objection") submitted herewith at ¶¶ 6-10; Voyk Decl. at ¶¶ 20-21. Only after the Tribe learned of the failure and discharge from a social media post, verified the discharge, and reported the violations to regulators, did defendants report the incident; defendants did not cease their demolition and construction activities until ordered to by regulators. Ladley Decl. Objection at ¶¶ 4-5, 9; Voyk Decl. at ¶ 21.

Defendants made minimal efforts to remove debris from the River after the illegal discharges. Ladley Decl. Objection at ¶¶ 12-13. *See also*, Declaration of Eric Marks, Dkt. No. 130-2 ("Marks Decl."), generally. Defendants' representations in 2020/2021 that they had found and removed all debris were *demonstrably false* in that the Tribe's Fisheries employees have continued to find and recover debris from the River continuously from the 2020 failure into the winter of 2023/2024. *See* Dkt. No. 149 at 6; Marks Decl. generally; Ladley Decl. Objection, ¶¶ 12-13, 17. During the fall of 2020, defendants continued to pressure regulators to allow the placement of large boulders and metal sheet pile in the River, (the "rock dam").[2]

On August 31, 2023, this Court ruled that defendants violated the Clean Water Act (1) in discharging turf into the River without an NPDES permit; (2) when the construction failed and

[2] On February 16, 2024, in the ESA case, the district court ordered removal of the rock dam no later than the summer 2024 work window, based upon ESA violations. Case No. 2:20-cv-01864-JCC, Dkt. No. 78.

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turf and liner washed and discharged into the River; and (3) that the use of turf violated defendants' Section 404 permit. Dkt. No. 149, at 7-10. Each of the three violations is continuing as the turf and liner have not been removed from the River and pieces still located at the Dam continue to break off, discharging pollutants. Marks Decl. and Supplemental Marks Decl., Dkt. Nos. 130-2 and 135-1, generally.

THE CONSENT DECREE

The Decree proposes to settle the case for (1) payment of $1.025 million penalty, (2) a turf management plan that consists of twice monthly monitoring by defendants for three years, reduced to every three months for a short time thereafter, and an obligation to remove debris if defendants think it is "safe" to do so, with infrequent oversight by a third party, (3) a restrictive deed on property in the watershed preventing defendants from altering the parcel and a promise that defendants will "cooperate" with anyone seeking to enhance habitat on the parcel, (4) stormwater measures for when defendants resume construction, and (5) an agreement that the rock dam will be removed at some undefined point in the future if and when defendants move ahead with the bladder dam and if the defendants do not move ahead (again at some undefined time) then a bond will be available for some of the removal. The Tribe objects to the Decree as not fair, unreasonable, inconsistent with the penalty requirements of the Clean Water Act and applicable case law, and contrary to the public interest.

OBJECTION TO CONSENT DECREE

In assessing whether a consent decree is fair, reasonable, and consistent with applicable law, a court must examine the specific law at issue and whether the decree is adequately protective of, and consistent with, the public interest. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). *See also*, *Turtle Island Network v. U.S. Dep't of Com.*, 672 F.3d 1160, 1165 (9th Cir.

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2012) (citing *Sierra Club, Inc. v. Elec. Control Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990)). Substantive fairness must be assured, *United States v. Pacific Gas & Electric*, 776 F. Supp. 2d 1007, 1024-25 (N.D. Cal. 2011) (citing *United States v. Cannon Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990)), and a court will examine elements of corrective justice and accountability, concepts that are built into the factors a court is to consider in assessing penalties under the Clean Water Act.

I. THE PENALTY IS INADEQUATE UNDER THE FACTORS SET FORTH IN THE CLEAN WATER ACT.

The Tribe objects to the amount of penalty which is one-third of one percent of what the law provides as the potential maximum penalty for three violations of the Clean Water Act, where the damage continues. The Decree does not comply with applicable law because the U.S. has failed to adequately assess the amount of penalty through the penalty factors that should be considered under the Clean Water Act. Further, the Decree is not fair in that it will not provide corrective justice, will not ensure accountability and future deterrence from these and similar defendants, and fails to properly consider the environmental justice and public interest impacts from the violations here.

A. The Clean Water Act Directs Mandatory Penalties for Each Violation for Each Day of Violation.

Under the Clean Water Act, once a court finds a violation, penalties are mandatory and assessed for each day of violation. 33 U.S.C. §1319(d); *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 1001-02 (9th Cir. 2000); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 818 (2001); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F2d. 1128, 1141-42 (11th Cir. 1990); *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). For violations after November 12, 2015, and assessed after August 3, 2023, the law

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provides a maximum penalty of $64,619 per day, per violation. 88 Fed. Reg. 51,234 (Aug. 3, 2023).

In assessing penalties, the Act directs the court look at the following factors:

- Seriousness of the violation;
- Economic benefit from violation (if any);
- History of violations;
- Good faith efforts to comply;
- Economic impact of the penalty on the violator;
- Such other considerations as justice requires.

33 U.S.C. § 1319(d). Here, none of these factors counsel for significant reductions in the maximum allowable penalty such as the U.S. has given.

B. The Decree Penalty is a Small Fraction of the Maximum Potential Penalty.

This Court found 3 violations in this case:

(1) initial placement of turf without permit (commencing July 20, 2020);

(2) turf violates Nation-Wide Permit (commencing July 20, 2020); and

(3) failure resulting in discharge of turf and liner (commencing July 29, 2020). [3]

Each of these violations is continuing because turf, liner, and Geotech fabric continue to be found downstream of the Dam and because those materials remain embedded at the Dam with pieces continuing to break off and discharge into the River. Marks Decl. at ¶¶ 21, 22, 25; *Benham v. Ozark Materials River Rock, LLC.*, 885 F.3d 1267, 1275 (10th Cir. 2018); *Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir. 1993); *Black Warrior River-Keeper, Inc. v. Drummond Co.*, 387 F. Supp. 3d 1271, 1295 (N.D. Ala. 2019) (and cases cited therein); *Ctr. for Biological*

[3]The Tribe is calculating penalties only on the claims the Tribe was a party to. There are actually four violations, when counting the stormwater charge, on which defendants were found liable, Dkt. No. 149 at 15, making the maximum allowable penalty potentially higher.

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Diversity v. Marina Point Dev. Ass'n, 434 F. Supp. 2d 789, 798 (C.D. Cal. 2006) (and cases cited therein).

If one calculates the number of days from the violations through to the estimated last day of scheduled trial (October 29, 2023), the maximum potential penalty in this case is **$229,526,688**, *almost 224 times greater* than what the U.S. proposes in a case it *won*.[4] For perspective,

- ½ (50% reduction in penalty) of the allowable penalty is $114,763,344;
- ¼ (75% reduction in penalty) of the allowable penalty is $57,381,672;
- 10% (a 90% reduction) $22,952,668, is still *22 times greater* than the settlement amount;
- 1% (99% reduction in penalty) is effectively $3 million—three times the settlement.

C. The Clean Water Act Factors Do Not Support a Steep Penalty Reduction.

The U.S. has agreed to this sharp reduction without adequately demonstrating application of the required Clean Water Act factors to determine whether reduction in penalty is warranted, much less how much.

First, the violations and harm from the violations are extremely serious. In particular, the discharge of plastics and crumb rubber that contains 6PPD, a substance that is highly toxic to salmonids, has caused and continues to cause significant damage to the River. Ladley Decl. at ¶ 14; Declaration of Janette K. Brimmer ("Brimmer Decl.") submitted herewith, Ex. A (Stark

[4] The Tribe has also calculated, set forth below, a substantial, but much more fair, reduced figure based upon one violation (given that the three violations all stem from the unpermitted use of artificial turf).

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Rebuttal Expert Report, Mar. 8, 2023).[5] Crumb rubber was distributed the entire length of the River below the discharge. Marks Decl. at ¶ 5. Rubber with 6PPD is conclusively shown as almost immediately lethal to coho salmon, and only moderately less lethal (with likely sublethal toxic effects) to steelhead and Chinook salmon. Brimmer Decl. Ex. A at 4-5. 6PPD-q can continue to release and have harmful effects for a long time. *Id.* The debris defendants discharged into the River continues to be found and turf and liner materials are still buried at the Dam where they continue to discharge pollutants into the River. Marks Decl. at ¶¶ 4-25; Ladley Decl. at ¶¶ 12-13. The Decree allows these materials to remain in the River until defendants choose to move forward with the bladder dam. Therefore, this source of pollution will continue to degrade and harm the River into the future.

The second factor, economic benefit to the defendants, is largely not relevant here. Normally that factor is relevant where a polluter wrongly avoided application of pollution abatement procedures or equipment, thereby obtaining a financial benefit. Here, defendants may have gained some financial benefit in that the artificial turf was essentially garbage, obtained by defendants for free, as opposed to some other underlayment material. To the extent this factor is relevant at all, it counsels against a reduction in penalty.

As to the third factor, the Tribe is not privy to a history of other or additional Clean Water Act violations at this site, nor whether defendants have been penalized for Clean Water

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[5] The U.S. Environmental Protection Agency recently accepted a petition from several West Coast Tribes to regulate 6PPD under the Toxic Substances Control Act. https://www.epa.gov/system/files/documents/2023-11/pet-001845_tsca-21_petition_6ppd_decision_letter_esigned2023.11.2.pdf.

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Act violations elsewhere.[6] While this may allow some attenuation, it does not counsel for a 99% reduction in penalty.

The fourth factor is particularly important because a primary reason for penalties is to ensure that bad actions and bad faith are sufficiently penalized to disincentivize that behavior from defendants in the future and to disincentivize any similar behavior from actors elsewhere. When a defendant is perceived as receiving a slap on the wrist, *e.g.* by a 99.97% reduction in their penalty, a law may quickly lose force and its purpose be impeded.

Here, defendants plainly acted not just without good faith, but affirmatively in bad faith. Defendants knew the placement of turf violated the Act and their permits. Voyk Decl. at ¶¶ 8, 13-17; Ordonia Decl. Ex. K at 50:3-51:19, 55:5-57:7, 65:2-20, 113:7-116:16. The evidence demonstrates defendants were told in advance that the chance of the liner failure that ultimately occurred was high; that their engineering was suspect. Ordonia Decl. Ex. G at 65:16-68:14. Once the failure and catastrophic discharge occurred, instead of immediately ceasing work in the River and notifying regulators (or the Tribe), defendants continued to do in-channel work, worsening the situation and allowing the unchecked discharge of toxic crumb rubber and debris and ultimately creating a situation where they then advocated for the unpermitted placement of the rock dam. Voyk Decl. at ¶¶ 20-21 (including photographic exhibits) and Ladley Decl.

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[6] Of relevance due to the similarities to here, Mr. Fischer's decisions and operations in disregard of legal requirements was at issue in a case concerning a dam project in Alaska, 20 years prior to the incident at Electron. According to the findings, decision, and order from the Alaska Department of Labor and Industry against Mr. Fischer's company Whitewater Engineering, Mr. Fischer and Whitewater engaged in similar behavior of disregarding the advice and direction of experts regarding avalanche risks and required safety practices on the dam project, resulting in the death of an employee. Brimmer Decl. Ex. B, copy of Decision and Order. While not Clean Water Act issues, it is a similar incident of purposeful and knowing disregard for legal requirements on work sites, exhibiting a pattern.

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Objection at ¶¶ 6-7, 10. It was only after *the Tribe notified* regulators and regulators contacted defendants with stop work instructions, that defendants ceased work, almost a week after the initial failure. Ladley Decl. Objection at ¶¶ 14-16. This is bad faith. Finally, following notification of the regulators and the cessation of work, defendants represented that they had searched the River and removed all the debris, which was demonstrably false. *See* Marks declarations generally with photos showing mounds of debris collected by Fisheries personnel over a course of *years* since defendants made their representation. Turf and other liner materials are still at the dam site despite defendants having had years to remove them. Marks Decl. at ¶ 12; Ladley Decl. at ¶ 13.

For the economic impact factor, there is no evidence of inability to pay and the U.S. does not address this issue. The U.S. conducted limited discovery on this point and defendants provided almost no information in response, choosing instead to mostly object to discovery requests. Defendants should be presumed to have the ability to pay. It is defendants' burden to demonstrate inability to pay and it appears the U.S. has done little to press them to carry that burden. Further, consideration of economic impact does not mean that there should be no or only minimal economic impact. Rather, for the penalty to serve the purpose of punishment and deterrent, the penalty must be enough that the defendants suffer some negative impact, otherwise the penalty is simply absorbed as a cost of doing business. There is no evidence that defendants will suffer anything more than a cost of doing business with the small penalty in the Decree.

D. Justice and the Public Interest Dictates a Higher Penalty.

As part of the consideration of justice, the public interest, and substantive fairness as related to the penalty amount, the U.S. must consider who is harmed and in what way to fully consider how justice must be served. The U.S. points out (patronizingly and unnecessarily) that

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penalties are not compensatory damages. U.S. Motion to Enter Decree, Dkt. No. 161 at 10. The Tribe is well aware that a penalty is a payment to the U.S. Treasury for regulatory purposes such as deterrence and punishment. The Tribe is not seeking or expecting compensatory damages from this (or currently any other) action. That does not mean that the harm suffered by the Tribe is irrelevant to considerations of fairness and justice and the fact is that the Tribe has been severely harmed by the actions of defendants.

The River itself is named for the Tribe where the Puyallup people have lived and fished since time immemorial. The Electron Dam was forced upon the Tribe, built without their consent, and defendants' actions have continued and greatly increased that harm. The Tribe is a fishing tribe dependent upon salmon from the River for their culture and subsistence. The Tribe retains a protected treaty right to fish the River and works to protect the fishery. That work has been harmed and disrupted as has the culture and treaty rights of the Tribe by the defendants' actions here. *See* Sterud Decl. at ¶ 10. Further, it is relevant and well-known that the Tribe's lands have been surrounded by heavy industrial development in Tacoma and Puyallup, placing a heavy cumulative environmental burden on the Tribe, now with the addition of 6PPD-q into a source of their food supply from the violations at issue here. Justice demands that the significance, type, and overall weight of the harm inflicted by defendants through their violations of the Clean Water Act be considered and weighed in favor of increased penalties in this case.

E. The Tribe Requests a Revised Penalty of $10 Million.

As set forth above, the maximum for three violations over three years is well in excess of $200 million. The Tribe requests a penalty of $10 Million. In arriving at this figure, the Tribe consolidated the penalty into one violation (from the fact that the three violations, while separate and distinct under the law, each stemmed from the use of artificial turf and the resulting failure

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of the turf), calculated from July 20, 2020, to the first day that was scheduled for trial (a total of 1,185 days even though turf and liner remain at the Dam and are a continuing source of pollutant discharges) at a reduced penalty of $10,000 per day of violation (as compared with the statutory maximum of $64,619 per day). This totals $11,850,000. The Tribe's request rounds down to an even $10,000,000.

The Tribe's request is much more reasonable, fair, and hopefully properly deterrent, than the small penalty agreed to by the U.S. The number of days of violation is wholly supportable in that pollutants continue to be discharged into the River and the source of those pollutants at the Dam has not yet been removed and need not be removed under the Decree until some indefinite point of time in the future. The figure of $10,000 per day appears to be roughly one third of the maximum courts in the Ninth Circuit have awarded per violation, as surveyed by the Central District of California in *Los Angeles Waterkeeper v. A & A Metal Recycling, Inc.*, 2015 WL 13917738 (C.D. Ca. Nov. 18, 2015) at *8 (where the court's survey of other awards finds a range from $37.50 to $32,500 per day of violation and the court ultimately awards the requested $3,000 per day, but also finds that a much higher award would be warranted under the court's analysis of the Clean Water Act factors). *See* additional examples of penalty awards within Ninth Circuit courts at *California Sportfishing Protection Alliance v. Callaway*, 2012 WL 3561968 at *2 (E.D. Cal. Aug. 17, 2012) (where the court used a top-down assessment of the Clean Water Act factors and imposed a penalty on a single violation of $29.925 million); *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1169-70 (D. Idaho 2012) (where the court awards a "starting" minimum of $2,000,000 with the ability to add to that later); and *Hawai'i's Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1397 (D. Haw. 1993) (where the court, 30 years ago, awarded $312,000 for simple reporting violations alone that had caused no

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apparent pollutant problem). The Tribe's request is reasonable and fair, is within the range utilized by courts in the Ninth Circuit, and does not give undue reductions under the applicable Clean Water Act factors.

II. THE TURF MANAGEMENT PLAN IS INADEQUATE.

The Turf Management portion of the Decree is inadequate to ensure that defendants fully clean up the pollutants they have discharged and are discharging. First, the agreement is too limited in scope. As described by Eric Marks, pollutants discharged by defendants have been found all the way downstream from the Project to at least River Mile 3 (approximately 38 miles downstream of the Project). Yet the settlement agreement only requires monitoring 3 miles downstream of the Project (as well as a 2-mile piece below the powerhouse). This leaves over 29 miles of River unexamined by defendants.

Second, too much of the responsibility is dependent on the defendants when they have demonstrated their lack of good faith in ensuring pollutant removal. As noted above, defendants early on represented that turf and other materials had been removed, yet the Tribe has spent hours finding and removing pollutants since then. Further, the Tribe has demonstrated that turf and liner remain partially buried at the Dam, serving as a continuing source of pollutants to the River. Defendants have had over three years to remove this source and have failed to do so.

Third, much of the burdens for finding and removing pollutants, even with an independent monitor, will fall on the Tribe, making the primary victim of the defendants' violations, also the primary party to do the monitoring and identification of pollutants. It is the Tribe who has expended the resources necessary to fully monitor and recover pollutants discharged by defendants to date and it is the Tribe who has the expertise—not the general public—to continue to monitor and identify pollutants.

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The Tribe asks that an independent third party be selected by the Tribe and the U.S., paid for by defendants, to do *all* monitoring under the Turf Management Plan. Further, the monitoring must be extended much further downstream, based upon where pollutants have been found to date. Finally, the turf and liner materials that are still present at the Dam must be completely removed by defendants during the next summer work window, again under the supervision and control of an independent contractor selected by the U.S.

III. THE TIMELINE FOR REMOVAL OF THE ROCK DAM IS TOO GENEROUS.

The provisions of the Decree concerning the rock dam, which is actively harming fish, include no definite date for removal of this harmful structure from the River. Even considering that the Corps' confusing and unhelpful correspondence allowed the rock dam in the fall of 2020, there is no dispute that the Corps made abundantly clear permission to allow a rock dam was temporary. Nonetheless, the Decree contemplates at least another year and likely more before it is removed. And it need only be removed when defendants are allowed to move forward with their preferred project; that is, defendants would be removing the rock dam anyway. There is no mitigation for harm to fish from this part of the Decree.

CONCLUSION

Justice demands a higher penalty than that agreed to by the U.S. Considering all the factors together shows defendants purposefully and knowingly violated the Clean Water Act, failed to clean up after themselves, misrepresented that fact, and exhibited bad faith both before and immediately following the violations. Nothing in that narrative suggests reduction in maximum allowable penalties, much less a 99.97% discount. Rather, the $10,000,000 requested by the Tribe is reasonable, just, and supported by the Clean Water Act factors and case law.

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Further, nothing in the record of this case suggests that relying on defendants to address the continuing pollution from their actions is justified or likely to succeed. The Tribe respectfully requests the Court deny approval of the proposed Decree.

DATED this 8th day of April, 2024.

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CERTIFICATE OF SERVICE AND WORD COUNT

I hereby certify that on the 8th day of Apil, 2024, I electronically filed the foregoing Notice of Withdrawal with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record in this matter.

I certify that this memorandum contains 4,150 words, excluding the caption, table of contents, table of authorities, signature blocks, and certificates, in compliance with the Local Civil Rules.

DATED this 8th day of Apil 2024.

s/ Janette K. Brimmer
JANETTE K. BRIMMER, WSBA #41271

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