Nos. 16-1209 & 16-1249

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TIMOTHY C. DIETZ,
Plaintiff-Appellee/Cross-Appellant,

– v. –

CYPRESS SEMICONDUCTOR CORPORATION,
Defendant-Appellant/Cross-Appellee.

On Appeal and Cross-Appeal from the U.S. District Court for the District of Colorado, No. 1:16-cv-000832-LTB, Judge Lewis T. Babcock

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THIRD BRIEF ON CROSS-APPEAL BY APPELLANT CYPRESS SEMICONDUCTOR CORPORATION

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INTRODUCTION

Dietz presses two principal points in his Second Brief. Neither has merit.

First, he insists that Cypress's appeal of the district court judgment enforcing orders of the Administrative Review Board (the "ARB Orders") should not be heard together with the petitions for review of the orders themselves. Rather, he insists, this Court should proceed on parallel tracks as if the matters were unrelated; he apparently seeks to create the possibility that the orders might be enforced for some brief period and then struck down. He goes so far as to maintain that the judgment enforcing the orders should be affirmed even if the orders are unsustainable. But Dietz is wrong. He is entitled to no recovery if the ARB Orders are reversed, and it makes no sense to decide this appeal separately.

Second, on his cross-appeal, Dietz quarrels with Congress's choice to require a party seeking to enforce an ARB order to file a "civil action" that is subject to the Federal Rules of Civil Procedure and therefore results in a "judgment." Dietz's cross-appeal is meritless, not least because, in denying his petition for a writ of mandamus in No. 16-1205, this Court already rejected his contention that the district court erred by staying execution of its judgment after Cypress posted a $1.25 million supersedeas bond. Dietz did not seek rehearing of that decision, which is now law of the case.

Dietz also tries to save his cross-appeal by rewriting the procedural history of the case. Dietz asserts that the district court stayed the ARB's Orders, but that is not what the court did. The district court merely stayed execution of the money judgment that it entered in Dietz's civil action. As this Court already held in this case, the stay of execution was proper because Dietz's civil action is governed by the Federal Rules of Civil Procedure, and the district court's order is a straightforward application of Rule 62(d). Dietz is also wrong to object to the district court's entry of a judgment. Dietz *expressly asked* the district court to enter that judgment in his favor, and cannot cross-appeal from this invited error. Finally, Dietz never presented the district court with his argument that it should have entered "equitable enforcement" of the ARB order for monetary relief rather than entering a judgment. *See* Dietz Second Br. 18. Even if this Court were to reach the merits of Dietz's cross-appeal, a judgment was appropriate here, where Dietz attempted to compel payment of money awarded to him by the ARB Orders.

The Court should consolidate this case with the Petitions Case and reverse the district court's judgment for Dietz, rendering moot the district court's order staying execution of that judgment.

ARGUMENT

I. The District Court's Enforcement Order Should Be Reversed In Tandem With The Erroneous Orders Of The Administrative Review Board.

To break the self-evident link between the questions of validity of the district court's judgment enforcing the ARB Orders and the validity of the Orders (now before the Court in Nos. 16-9523, 16-9529, and 16-9534 (the "Petitions Case")), Dietz offers a series of meritless arguments.

Dietz contends that this Court should affirm the district court's judgment—and he should be paid under it—even if this Court reverses the ARB Orders. *See* Dietz Second Br. 11 (arguing that this Court should affirm the judgment even if Dietz confessed error on the merits of the ARB Orders). Dietz is wrong. If this Court holds that the ARB's Orders are erroneous and reverses those orders, then the district court's judgment enforcing the ARB's Orders is equally erroneous and must be reversed.

This Court recognized that principle in *Rollins v. Am. Airlines, Inc.*, 279 F. App'x 730 (10th Cir. 2008), which Cypress cited (First Br. 22) but Dietz ignores. In *Rollins*, this Court squarely held that a plaintiff is not entitled to enforcement of an administrative order that is later vacated. 279 F. App'x at 732. This Court explained that a vacated "order should not have been entered in the first place" and that enforcement of that order would be "an unjustified windfall." *Id.*

The same is true here. As Cypress showed in its First Brief here, and its Opening Brief in the Petitions Case (filed Aug. 29, 2016), the ARB erred on numerous, independently dispositive grounds. If this Court agrees with Cypress that the ARB's Orders are erroneous, then (as in *Rollins*) any payment to Dietz would be "an unjustified windfall." *Rollins*, 279 F. App'x at 732.

Dietz also falsely claims that Cypress "does not argue that the district court erred in the performance of its 'ministerial' duty." Dietz Second Br. 8. But Cypress *does argue* that the district court's *judgment* is erroneous, and "federal appellate courts[] do[] not review lower courts' opinions, but their judgments." *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015). A judgment that is predicated on an erroneous order must be reversed, even if the lower court was bound to apply that erroneous order. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 752-53, 791 (2010) (overruling Supreme Court's prior precedents, and reversing lower court decision that correctly applied those precedents); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330, 345-46 (1996) (similar).

Finally, Dietz repeatedly invokes *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), to support his uncontested claim that "the district court may not relitigate the underlying merits" of the ARB Orders. Dietz Second Br. 8. Dietz even asserts that "Cypress now asks this Court *sub silentio* to overrule

Brock." *Id.* at 9. Dietz's reliance on *Brock* is entirely misplaced, as *Brock* supports Cypress, not Dietz.

In *Brock*, a company timely petitioned for this Court's review of an administrative order finding that the company unlawfully discriminated against an employee. But the company had failed to timely challenge the scope of the remedy, which the company believed should have required reinstatement only until a specific date. 780 F.2d at 1514. The company tried to collaterally attack the merits of the agency order in the employee's district court enforcement action, asking the district court to remand to the agency or take evidence on its own to determine the appropriate scope of the remedy. *Id.* at 1508, 1514-15. The district court refused to entertain the collateral attack, and the company appealed from the district court judgment. *Id.*

This Court consolidated the company's timely petition for review with its "related" appeal from the district court's judgment (*id.* at 1507), decided (and rejected) the petition on the merits (*id.* at 1510-13), and then affirmed the district court's judgment (*id.* at 1514-15). In addressing the district court proceedings, this Court explained that the district court correctly refused to "entertain[] evidence" on the company's collateral attack, because the district court's role was "ministerial," and "[a]n appeal from the [agency's] decision can lie only with the court of appeals." *Id.*

In contrast to the company in *Brock*, Cypress did not try to collaterally attack the ARB's Orders in the district court. Instead, Cypress has presented its substantive challenges *in this Court*, just as *Brock* requires. Moreover, Cypress has asked this Court to consolidate the appeal from the district court's judgment with the "related" petitions for review, exactly what this Court did in *Brock*. By opposing consolidation, only Dietz—not Cypress—asks this Court to depart from *Brock*.

In short, because the ARB erred in ordering relief for Dietz, the district court erred in enforcing the ARB's Orders. If and when this Court determines in the Petitions Case that the ARB Orders should be reversed, reversal in this case necessarily follows.

II. This Appeal Should Be Consolidated With The Petitions Case.

Setting aside the obvious linkage between the Petitions Case and this case, Dietz rebuts neither of the overarching reasons why the Petitions Case and this case should be consolidated: consolidation advances judicial economy, and it prevents significant harm to the parties. *See* Cypress First Br. 24-27.[1]

[1] Dietz is wrong to claim that this Court "reject[ed]" Cypress's earlier consolidation motion. Dietz Second Br. 12. In fact, the motions panel held that "[t]here will be no decision *at this time* regarding whether all of these matters will be submitted together for consideration," Order at 2, No. 16-1209 (10th Cir. June 13, 2016) (emphasis added), which simply deferred the issue of consolidation to the merits stage.

Judicial economy. Dietz does not dispute the many efficiency gains from consolidation. There is no dispute that consolidation will allow this Court to issue one decision instead of two, by one panel instead of two. *See* Cypress First Br. 25. There also is no reasonable dispute that the result in this case will follow from the result in the Petitions Case: if this Court reverses the ARB Orders, it must reverse the district court's judgment for Dietz; and if this Court affirms the ARB Orders, it should affirm the district court's judgment for Dietz. *Id.* No more than a sentence or two would be needed to dispose of this appeal, regardless of the result of the Petitions Case.

Dietz does contest Cypress's explanation that, without consolidation, this Court might be required to decide a difficult issue of first impression: whether a court of appeals should affirm a judgment that enforces an ARB order that may well be wrong and is currently under review by the same court of appeals, but has not yet been overturned. Cypress First Br. 25. Dietz insists that the argument is "frivolous" because *Brock* "authoritatively decided" the issue. Dietz Second Br. 12. But Dietz's reliance on *Brock* makes little sense, because in *Brock* this Court *consolidated* the appeal with the "related" petition for review, and decided the two cases together. 780 F.2d at 1507. *Brock* supports consolidation here.

Dietz also does not deny that additional litigation may be required in the absence of consolidation. *See* Cypress First Br. 25-26. On the contrary, Dietz

invites Cypress to multiply proceedings further by filing an unnecessary Rule 18 motion to stay the ARB's Orders (Dietz Second Br. 14), just as Cypress had forewarned (Cypress First Br. 26). And Dietz does not deny that, without consolidation, Cypress might be forced to file an additional, unnecessary lawsuit in order to recover the money paid to Dietz and his attorneys. *See id.*; *see also Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1231 (10th Cir. 2009) (Hartz, J., concurring). Dietz offers no good reason why the courts and the parties should suffer through these additional motions and lawsuits that can be entirely avoided by consolidation.

Harm. Dietz offers no authority for his claim that Cypress must prove irreparable harm as a prerequisite to obtain consolidation. *See* Dietz Second Br. 14. In fact, Dietz consented to consolidation of Cypress's appeal with Dietz's cross-appeal, and to consolidation of Cypress's three petitions for review, without suggesting that there would be irreparable harm in the absence of consolidation. Here, where irreparable harm *is* likely, there is even more reason to grant consolidation.

And Dietz has little to say in response to Cypress's arguments on the risk of harm. Cypress demonstrated that, without consolidation, it faces the threat of irreparable harm because, if Cypress pays Dietz now, Dietz and his attorneys could dissipate those funds while this Court is considering the Petitions Case. *See*

Cypress First Br. 26. Cypress explained that Dietz and his attorneys could be forced into bankruptcy if they are unable to repay Cypress, so that Cypress might not be made whole. *Id.*

Dietz ignores the bankruptcy point. And his only response to the threat of asset dissipation is that "'economic loss does not constitute irreparable harm, in and of itself.'" Dietz Second Br. 14. But asset dissipation and bankruptcy differ in kind from mere economic loss. *See Title v. Warren*, 612 F. App'x 5, 5 (D.C. Cir. 2015) ("dissipating funds" creates irreparable harm); *Tisino v. R & R Consulting & Coordinating Grp., L.L.C.*, 478 F. App'x 183, 186 (5th Cir. 2012) (same); *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005) (same). Moreover, whether "irreparable" or not, the harm from asset dissipation is significant, and it is entirely avoidable by consolidating the cases.

Dietz also does not deny that the $1.25 million supersedeas bond that Cypress has posted ensures that Dietz will receive payment if he prevails in the Petitions Case, while ensuring that there is no asset dissipation if Cypress prevails. *See* Cypress First Br. 25. Dietz's only claim of harm is that he might have to wait a bit longer to receive payment. *See* Dietz Second Br. 13-14. But that is no harm at all, because the district court's judgment is accruing interest during this appeal. *See* Cypress First Br. 26-27. Any delay also is likely to be short, as briefing in the

Petitions Case and in this appeal are currently scheduled to be completed within weeks of each other.

Because consolidation advances judicial economy and prevents significant harm to the parties, the Court should consolidate this case with the Petitions Case.

III. Dietz's Cross-Appeal Should Be Rejected.

Dietz's cross-appeal is a thinly disguised attack on Congress's choice to render ARB orders enforceable only through "a civil action" filed in district court. 49 U.S.C. § 42121(b)(6)(A).

Dietz tries to confuse and obscure the legal issues by mischaracterizing the procedural history. After the ARB issued its first order, Dietz filed "a civil action" against Cypress to enforce the ARB's Orders. 49 U.S.C. § 42121(b)(6)(A); *see* 18 U.S.C. § 1514A(b)(2)(A) (incorporating the rules and procedures of 49 U.S.C. § 42121(b)). Dietz's complaint repeatedly requested a "judgment in his favor." A6; *accord* A9 (seeking a "judgment enforcing the Final Order" and a "judgment in [Dietz's] favor and against Cypress"). Soon thereafter, Dietz filed a motion to obtain some, but not all, of the relief that the ARB had ordered. *See* A131.

Cypress moved to stay the district court action. A134-40. In its stay motion, Cypress also volunteered to post a supersedeas bond, explaining that a supersedeas bond is the relief that Dietz would receive even if he prevailed in the district court action. A138-39. Although Dietz now admits that the district court had the

authority to stay the district court action (Dietz Second Br. 17), Dietz took the opposite position in the district court, arguing that "Cypress's requested stay must be denied." A154.

The district court decided to cut to the chase by entering a judgment for Dietz that enforced the ARB's Orders (A172-73), the very relief that Dietz requested in his complaint. But the district court agreed with Cypress that, once a judgment was entered for Dietz, Cypress had the right under Federal Rule of Civil Procedure 62(d) to post a supersedeas bond to stay execution of that judgment. A173-74. The district court found that a $1.25 million bond would fully protect Dietz during the pendency of the appeal. A174. Dietz did not seek reconsideration of the district court's order or the final judgment. Instead, Dietz petitioned this Court for mandamus. *See* Petition, No. 16-1205 (10th Cir. May 19, 2016).

Days after the district court entered the final judgment, Cypress moved that court to accept a $1.25 million supersedeas bond. A179-86. Dietz did not oppose that motion. Three days later, the district court granted Cypress's motion and accepted the $1.25 million supersedeas bond, thereby staying execution of the judgment. A187.

On June 13, 2016, without calling for a response, this Court denied Dietz's mandamus petition. Order, No. 16-1205 (10th Cir. June 13, 2016) ("Mandamus Order"). Later that day, Dietz filed his cross-appeal. A188.

Dietz's cross-appeal deserves the same fate as his mandamus petition. The cross-appeal should be denied.

A. Dietz's Cross-Appeal Is Precluded By The Law Of The Case.

Dietz's effort to relitigate his mandamus petition is barred by the law-of-the-case doctrine. Dietz argues on cross-appeal that the district court erred by entering a judgment in his favor and exceeded its jurisdiction by staying execution of that judgment upon Cypress's posting of a supersedeas bond pursuant to Rule 62(d). Dietz Second Br. 1-2, 15-21. Dietz made the same arguments, at many points word-for-word, in his mandamus petition. *See* Petition 6-9, No. 16-1205 (10th Cir. May 19, 2016). This Court rejected those arguments on the merits, holding that "[t]he district court acted within its jurisdiction in the enforcement action, which is a civil action governed by the Rules of Civil Procedure," and this Court specifically cited "Rule 62(d) [which] permits an appellant to obtain a stay of the judgment through posting a supersedeas bond." Mandamus Order 2.

A "denial … on the merits" of a mandamus petition "preclude[s] further consideration of the issues raised therein under … law of the case." *United States v. Holland*, 66 F.3d 339, 1995 WL 539589, at *1 (Table) (10th Cir. 1995) (unpublished); *see also Kennedy v. Lubar*, 273 F.3d 1293, 1299 (10th Cir. 2001) ("'Law of the case'" applies to "mandamus decisions actually deciding the case on the merits"); *United States v. Springer*, 444 F. App'x 256, 266-67 (10th Cir. 2011)

(applying law of the case to bar an appeal, where this Court had previously rejected the appellant's same arguments when they were made in a mandamus petition). This Court concluded that the district court did not take "any improper action" by staying execution of the judgment under Rule 62(d). Mandamus Order 2. That merits determination is law of the case. As such, Dietz's cross-appeal should be rejected.

B. The District Court Had Jurisdiction To Stay Execution Of The Judgment.

In an argument equally at war with the structure of the governing statutes, Dietz maintains that the district court lacked jurisdiction "to stay enforcement of the [ARB's] Orders." Dietz Second Br. 15. As this Court correctly explained, however, in an order not subject to collateral attack, "the district court did not stay the ARB's final order pending review in this Court." Mandamus Order 2. "Instead, the district court entered judgment on Mr. Dietz's separate civil enforcement action and, consistent with Rule 62(d), stayed enforcement of the judgment pending appeal after approving Cypress' supersedeas bond." *Id.*

Dietz claims that the district court's action was "contemplated by neither Congress nor the Supreme Court." Dietz Second Br. 17. But Dietz overlooks the words that both Congress and the Supreme Court actually used. Congress allowed Dietz to file "a civil action" against Cypress to obtain enforcement of the ARB's Orders. 49 U.S.C. § 42121(b)(6)(A); *see also* 18 U.S.C. § 1514A(b)(2)(A)

(incorporating the rules and procedures of 49 U.S.C. § 42121(b)). The words "a civil action" have legal significance that Dietz ignores.

The very first rule of the Federal Rules of Civil Procedure—which were promulgated by the Supreme Court with the assent of Congress—explains that the Federal Rules of Civil Procedure "govern the procedure in *all civil actions* and proceedings in the United States district courts." Fed. R. Civ. P. 1 (emphasis added). While the Rules do not apply to certain actions that are enumerated in Rule 81, actions under 18 U.S.C. § 1514A and 49 U.S.C. § 42121(b)(6)(A) are not exempted. Thus, the Federal Rules of Civil Procedure applied in the district court.

Under those rules, a civil action ends in a judgment, which "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). If the judgment is appealed, "the appellant may obtain a stay by supersedeas bond." Fed. R. Civ. P. 62(d). A party posting a supersedeas bond is entitled to a stay of enforcement of the judgment as a matter of right. *See Herbert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992) (Rule 62(d) "entitles a party appealing a money judgment to an automatic stay upon posting a supersedeas bond"). The district court's order is thus a straightforward application of the Federal Rules of Civil Procedure.

Dietz's argument that the Federal Rules of Civil Procedure do not apply to a statute that "authorizes aggrieved persons to commence a 'civil action'" is

"frivolous." *Bell v. Pleasantville Housing Auth.*, 572 F. App'x 93, 94 (3d Cir. 2014). "Ever since 1938, the federal civil rules have been applicable in all federal courts. They apply uniformly to all civil cases, whatever the cause of action or subject matter of the suit." *Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011). Dietz offers no authority suggesting that the Federal Rules of Civil Procedure do not apply here. As this Court recognized, the district court acted well within its jurisdiction by staying execution of the money judgment under Rule 62(d). *See* Mandamus Order 2.

C. The District Court Properly Entered Judgment In This Civil Action.

Dietz also contends that the district court erred by entering a judgment in his favor, rather than some other type of order compelling Cypress to comply with the ARB Orders. Dietz Second Br. 17-21. Dietz has waived that argument for two reasons. First, in his complaint, Dietz specifically requested that the district court "enter[] judgment in his favor and against Defendant Cypress Semiconductor Corporation … as set forth in the [ARB Orders]." A6; *see also* A9 ("WHEREFORE, Dietz moves the Court for an Order enforcing the Final Order, entering judgment in his favor and against Cypress as set forth in the Final Order, and awarding him his costs and attorneys' fees in this action."). Indeed, this Court recognized in its Mandamus Order that Dietz's complaint "requested that the court

'enter[] judgment in his favor'" and that the district court did precisely that. Mandamus Order 2.[2]

Dietz's cross-appeal is therefore barred by the invited-error doctrine, which prohibits "a party from inducing action by a court and later seeking reversal on the ground that the requested action was error." *John Zink Co. v. Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001); *see also Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1072 (10th Cir. 2008) (holding that a party invites error when district court adopts that party's allegedly erroneous judgment). Because Dietz "has invited the error that [he] now seeks to challenge," his argument is waived. *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008).

Dietz also waived his cross-appeal from the district court's money judgment for a second reason: Dietz never presented the district court with his current theory that there is a distinction between "equitable enforcement of the [ARB's Orders] instead of entry of a money judgment." Dietz Second Br. 18; *see also id.* at 7 (arguing that the district court should have "mandatorily enjoin[ed] compliance" with the ARB's Orders). Dietz was required to "cite the precise reference in the record where the issue was raised," 10th Cir. R. 28.2(C)(2), but he failed to do so

[2] Dietz now contends that he requested a judgment "[i]n an abundance of caution." Dietz Second Br. 17 n.11. But there was no such cautionary language in his complaint. The district court gave Dietz the very relief that he requested.

in his Second Brief. Indeed, the words "equitable," "enjoin," and "injunction" are absent from Dietz's district court filings. Having failed to raise this theory below, Dietz is "precluded from raising the issue for the first time on appeal." *Bangert Bros. Constr. Co. v. Kiewit W. Co.*, 310 F.3d 1278, 1296 (10th Cir. 2002).

Dietz's argument fails even if it is not waived. Dietz asked the district court to require Cypress's compliance with the ARB's Orders, and the district court did so by entering a judgment for Dietz that required Cypress to comply with the ARB's Orders. Dietz now argues that the district court should have issued "an order requiring Cypress's compliance" with the ARB Orders, rather than a judgment. Dietz Second Br. 17. This argument is nonsense. Because the Federal Rules of Civil Procedure define "judgment" to include "a decree and any order from which an appeal lies," Fed. R. Civ. P. 54(a), any "order requiring Cypress's compliance" with the ARB Orders necessarily would be a judgment. And judgments are subject to stay of execution under Rule 62.

Dietz's argument that he is entitled to "equitable enforcement of the Department's final orders" rather than a "money judgment" also is not supported by any authority. Dietz sought to enforce an administrative order that awards him $906,210.93 in damages, along with attorneys' fees. Cases where a plaintiff is seeking "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money" are treated "essentially as actions at law," for

which a money judgment is appropriate. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). The order sought by Dietz here has the "'substance' of a money judgment[:] a compelled transfer of money." *Id*. at 216. As such, the district court did not err simply by entering a money judgment in Dietz's favor (although it did err by enforcing the erroneous orders of the ARB).

CONCLUSION

This Court should decide this appeal together with Nos. 16-9523, 16-9529, and 16-9534, and should reverse the district court's judgment for Dietz, thereby rendering moot the district court's order staying execution of its judgment.

Dated: September 23, 2016

Respectfully submitted,

/s/ Donald M. Falk

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief that (1) all required privacy redactions have been made per 10th Cir. R. 25.2; (2) if required to file additional hard copies, that the ECF submission is an exact copy of the documents; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Virus definition version 1.229.52.0, last updated on September 23, 2016, and according to the program are free of viruses.

/s/ Donald M. Falk

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 4,157 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared using Microsoft Word and set in Times New Roman in a typeface size of 14 points.

/s/ Donald M. Falk

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system on September 23, 2016. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Donald M. Falk