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Nebraska Judicial Branch

Case Summary

In the District Court of Douglas County
 The Case ID is CI 16 0003120
 Mercer v. North Central Services, Inc.
 The Honorable Timothy P Burns, presiding.
 Classification: Negligence-Other
 Filed on 04/13/2016
 This case is Open as of 04/13/2016

Parties/Attorneys to the Case

Party	Attorney
Plaintiff ACTIVE Mark Mercer NE	Anne M O'Brien 10306 Regency Parkway Drive Omaha NE 68114 402-397-7300
Plaintiff ACTIVE Vera Mercer NE	Anne M O'Brien 10306 Regency Parkway Drive Omaha NE 68114 402-397-7300
Plaintiff ACTIVE Mercer Management Company NE	Anne M O'Brien 10306 Regency Parkway Drive Omaha NE 68114 402-397-7300
Defendant ACTIVE North Central Services, Inc. 5487 Hart Lane NW Bemidji MN 56601	Robert S Keith II 1350 Woodmen Tower Omaha NE 68102 402-348-0900
Defendant ACTIVE Unite Private Networks, LLC 7200 NW 86th Street Suite M Kansas City MO 64153	April N Hook Ste 3700 First National Tower 1601 Dodge Street Omaha NE 68102 402-341-3070
Defendant ACTIVE Cellco Partnership 1 Verizon Way Basking Ridge NJ 07920	Mark J Daly & Brennan, PC LLO 10050 Regency Circle Ste 200 Omaha NE 68114 402-342-1000
Alias is Verizon Wireless Defendant ACTIVE Metropolitan Utilities District c/o President 1723 Harney Steet Omaha NE 68102	Michael F Coyle 409 South 17th Street #500 Omaha NE 68102 402-341-6000
Intervenor ACTIVE Columbia National Insurance Company	Thomas J Culhane 10330 Regency Parkway Dr., #1 Omaha NE 68114 402-397-2200
Intervenor ACTIVE Farmer's Mutual Insurance Company	Michael T Gibbons 619 N 90th Street Omaha NE 68114 402-391-6000

Court Costs Information

Incurring By	Account	Date	Amount
Plaintiff	Petition	04/13/2016	\$35.00
Plaintiff	Filing Fee - State	04/13/2016	\$5.00
Plaintiff	Automation Fee	04/13/2016	\$8.00
Plaintiff	NSC Education Fee	04/13/2016	\$1.00
Plaintiff	Dispute Resolution Fee	04/13/2016	\$0.75
Plaintiff	Indigent Defense Fee	04/13/2016	\$3.00
Plaintiff	Uniform Data Analysis Fee	04/13/2016	\$1.00
Plaintiff	J.R.F.	04/13/2016	\$6.00
Plaintiff	Filing Fee-JRF	04/13/2016	\$2.00
Plaintiff	Legal Aid/Services Fund	04/13/2016	\$5.25
Plaintiff	Complete Record	04/13/2016	\$15.00
Plaintiff	Service Fees	05/31/2016	\$7.99
Plaintiff	Service Fees	05/31/2016	\$7.99
Plaintiff	Service Fees	05/31/2016	\$7.99

Financial Activity

No trust money is held by the court
No fee money is held by the court

Payments Made to the Court

Receipt	Type	Date	For	Amount
221232	Electronic Trans	04/14/2016	Mercer,Mark,	\$82.00
			Petition	\$35.00
			Filing Fee - State	\$5.00
			Automation Fee	\$8.00
			NSC Education Fee	\$1.00
			Dispute Resolution Fee	\$0.75
			Indigent Defense Fee	\$3.00
			Uniform Data Analysis	\$1.00
			J.R.F.	\$6.00
			Filing Fee-JRF	\$2.00
			Legal Aid/Services Fun	\$5.25

Receipt	Type	Date	For	Amount
			Complete Record	\$15.00

Register of Actions

03/27/2018 Motion Filed

This action initiated by party Unite Private Networks, LLC
 RE: Entry of AMD Sched Order 4/11/18 1:30pm CR 502 /mg
 Image ID N180867AWD01

03/05/2018 Notice-Service

This action initiated by party Farmer's Mutual Insurance Company
 RE: requests /dth
 Image ID N18064GHAD01

02/01/2018 Order-Consolidation

This action initiated by Timothy P Burns
 For Discovery & Extending Protective Order To All CI 17 8828 CI 17 9386
 CI 17 10590 CI 17 10592 CI 17 10856 CI 17 7993 CI 16 3120 / RT eNoticed
 Image ID 001619527D01

01/29/2018 Motion-Quash

This action initiated by party Mercer Management Company
 1/29/18 1pm /mg
 Image ID N180293KQD01

12/19/2017 Notice-Service

This action initiated by party Farmer's Mutual Insurance Company
 Re: Responses /mg
 Image ID N17353QZUD01

12/18/2017 Answer

This action initiated by party North Central Services, Inc.
 a1
 Image ID N17352KC2D01

12/15/2017 Order

This action initiated by Timothy P Burns
 RE: Stip Mot for Order Compelling Production of Responsive Documents by
 Verizon GRANTED / RT eNotice Certificate Attached
 Image ID 001605443D01

12/15/2017 Motion-Compel

This action initiated by party Mark Mercer
 Stipulated RE: Production of Responsive Documents by Verizon / RT
 Image ID 001605440D01

12/14/2017 Stipulation

This action initiated by group PLFS
 Re: motion for ord compel responsive docs by verizon; joint JB
 Image ID N17348B12D01

12/13/2017 Motion-Continuance

This action initiated by party Metropolitan Utilities District
 RE: deadline to respond /dth
 Image ID N173473GYD01

12/07/2017 Answer
kr This action initiated by party Metropolitan Utilities District
Image ID N17341EWS01

12/04/2017 Answer
kr This action initiated by party Cellco Partnership
Image ID N17338VXED01

11/30/2017 Answer
a1 This action initiated by party Unite Private Networks, LLC
Image ID N17334MAGD01

11/13/2017 Motion-Compel
12/20/17 8:45am CR 502 /mg
This action initiated by party Unite Private Networks, LLC
Image ID N17317QUCD01

11/09/2017 Complaint-Intervene
JB This action initiated by party Farmer's Mutual Insurance Company
Image ID N17313GRMD01

11/09/2017 Answer
kr This action initiated by party Cellco Partnership
Image ID N17313GLQD01

11/03/2017 Answer
a1 This action initiated by party North Central Services, Inc.
Image ID N17307VJ0D01

10/23/2017 Answer
kr This action initiated by party Metropolitan Utilities District
Image ID N17296CB8D01

10/16/2017 Answer
AL This action initiated by party Unite Private Networks, LLC
Image ID N17289HCMD01

10/11/2017 Order
RE: Mot to Intervene GRANTED eNotice Certificate Attached
This action initiated by Timothy P Burns
Image ID 001451635D01

10/04/2017 Motion-Continuance
10/5/17 2pm /mg
This action initiated by group PLFS
Image ID N17277AYOD01

10/04/2017 Complaint-Intervene
This action initiated by party Columbia National Insurance Compan
Image ID 001503651D01

09/29/2017 Motion-Intervene

Filed by Farmers Mutual Ins Co of NE
10/5/17 2pm CR 502 /mg
Image ID 001563126D01

09/28/2017 Order
This action initiated by Timothy P Burns
RE: Mot to Intervene GRANTED / RT eNotice Certificate Attached
Image ID 001562886D01

09/27/2017 Motion-Intervene
MG Filed by Columbia National Ins Co /mg
Image ID 001569903D01

09/11/2017 Pretrial Conference
03 05 18 100pm / RT

09/11/2017 Signed Scheduling Order
This action initiated by Timothy P Burns
RT eNotice Certificate Attached
Image ID 001552546D01

09/11/2017 Proposed Scheduling Order
This action initiated by Timothy P Burns

09/06/2017 Notice Issued
The document number is 00477045
Notice of Intent to Dismiss
Jason jgrams@ldmlaw.com
Image ID D00477045D01

09/06/2017 Notice Issued
The document number is 00477044

Notice of Intent to Dismiss
Michael F Coyle mcoyle@fraserstryker.com
Image ID D00477044D01

09/06/2017 Notice Issued
The document number is 00477043
Notice of Intent to Dismiss
Mark J Daly mdaly@fitzlaw.com
Image ID D00477043D01

09/06/2017 Notice Issued
The document number is 00477042
Notice of Intent to Dismiss
Lauren R Goodman lgoodman@mcgrathnorth.com
Image ID D00477042D01

09/06/2017 Notice Issued
The document number is 00477041
Notice of Intent to Dismiss
Robert S Keith II rkeith@ekoklaw.com
Image ID D00477041D01

09/05/2017 Answer
This action initiated by party Metropolitan Utilities District
ts
Image ID N17248UGYD01

08/28/2017 Motion-Quash
This action initiated by party Metropolitan Utilities District
8-31-17 3:00 PM JB
Image ID N1724021YD01

08/16/2017 order

This action initiated by Timothy P Burns
RE: DEFS Mot to Dismiss **see order** / RT eNotice Certificate Attached
Image ID 001541219D01

07/18/2017 Notice Filed
This action initiated by party Unite Private Networks, LLC
Re: Intent to Serve Subpoena /mg
Image ID N17199AQ4D01

05/18/2017 Notice-Service
This action initiated by party Unite Private Networks, LLC
Re: Responses /mg
Image ID N17138UA4D01

05/05/2017 Motion-Dismiss

This action initiated by party Metropolitan Utilities District
In Part
5/30/17 11:45am /mg
Image ID N17125GFGD01

04/17/2017 Return Summons/Alias Summons
The document number is 00444357
MG
Served 04/05/2017, Certified Mail
Image ID N17107ABAD01

04/12/2017 Answer
This action initiated by party Cellco Partnership
kr
Image ID N17102VJSD01

04/12/2017 Answer
This action initiated by party North Central Services, Inc.
ts
Image ID N17102VG4D01

04/12/2017 Answer
This action initiated by party Unite Private Networks, LLC
ts
Image ID N17102UTYD01

03/29/2017 Summons Issued on Metropolitan Utilities District
The document number is 00444358
E-MAILED: jgrams@ldmlaw.com
Image ID D00444358D01

03/29/2017 Summons Issued on Metropolitan Utilities District
The document number is 00444357
E-MAILED: jgrams@ldmlaw.com
Image ID D00444357D01

03/29/2017 Amended Complaint
This action initiated by group PLFS
MM
Image ID N170888XMD01

03/29/2017 Praecipe-Summons/Alias
This action initiated by group PLFS
MM
Image ID N170888ZCD01

03/24/2017 Order
This action initiated by Timothy P Burns

RE: Motion For Leave to File Amd Complaint GRANTED / RT eNotice Certificate Attached
Image ID 001475151D01

03/23/2017 Motion-Leave To File Add'l Pleading
This action initiated by group PLFS
3/24/17 10am CR 501 /mg
Image ID N1708209CD01

02/21/2017 Answer
This action initiated by party North Central Services, Inc.
..PM
Image ID N170524KGD01

02/07/2017 Order
This action initiated by Timothy P Burns

RE: Reassigned / Companion Cases CI 16 7667 CI 16 7277 CI 16 6760
CI 16 4798 CI 16 4659 CI 16 10124 CI 16 10353 / RT eNoticed
Image ID 001446164D01

02/07/2017 Case Manually Assigned
Previous Judge 15837; New Judge 17652; User ID C0126007
Consolidation (Lesley B.)

01/06/2017 Motion Sustained
re:protective order
Image ID 001433266D01

01/05/2017 Order
This action initiated by W. M Ashford
RE: Motion to Compel GRANTED / RT eNotice Certificate Attached
Image ID 001432932D01

12/22/2016 Recuse Judge
This action initiated by W. M Ashford
RT
Image ID 001425271D01

12/16/2016 Motion-Quash
hrng 12-21-16 @ 2:30 filed by Metro Utilities Dist
Image ID 001423586D01

12/16/2016 Affidavit
filed by Michael Coyle
Image ID 001425059D01

12/16/2016 Motion-Quash
filed by MUD 12-21-16 2:30 PM

Image ID 001425056D01

12/08/2016 Notice-Hearing
This action initiated by party Unite Private Networks, LLC
Re: Mot to Compel
12/21/16 2:30pm CR 412 /mg
Image ID N163435MAD01

11/29/2016 Amended Notice of Hearing
This action initiated by party Unite Private Networks, LLC
THIRD AMD Re: Mot to Compel
Rescheduled 12/21/16 2:30pm CR 412 /mg
Image ID N16334XTAD01

11/22/2016 Order-Consolidation
This action initiated by W. M Ashford

re:several cases eNotice Certificate Attached
Image ID 001414119D01

11/16/2016 Stipulation
This action initiated by party Unite Private Networks, LLC
Re: Consolidating Cases CI16 3120, CI16 4659, CI16 4798, CI16 6760
CI16 7277, & CI16 7667 /mg
Image ID N16321TRAD01

11/16/2016 Note from Court Staff
P/Order sent to Crt Admin /mg

11/16/2016 Amended Notice of Hearing
This action initiated by party Unite Private Networks, LLC
Re: Mot to Compel
Rescheduled 11/30/16 1pm CR 412 /mg

Image ID N16321T2SD01

11/10/2016 Recuse Judge
This action initiated by J. M Coffey
RT
Image ID 001407118D01

11/10/2016 Case Judge Reassigned Random
Previous Judge 10724; New Judge 15837; User ID C0126007

11/08/2016 Amended Notice of Hearing
This action initiated by party Unite Private Networks, LLC
Re: Mot to Compel
Rescheduled 11/14/16 1:30pm CR 507 /mg
Image ID N1631309QD01

11/03/2016 Order
This action initiated by Gary B Randall
RE: To Reassign / RT eNotice Certificate Attached
Image ID 001391279D01

11/02/2016 Case Judge Reassigned Random
Previous Judge 13429; New Judge 10724; User ID C0126007

10/24/2016 Motion-Consolidation
This action initiated by party Cellco Partnership
RE: For Disc Only CI16-4659, CI16-4798, CI16-6760, CI16-7277, & CI16-7667
11/4/16 10:30am CR 316 JOINT /mg
Image ID N16298C60D01

10/14/2016 Notice-Hearing
This action initiated by group PLFS

RE: Mot to Consolidate
11/4/16 10:30am CR 316 /mg
Image ID N16288GQID01

10/04/2016 Order
This action initiated by Gary B Randall
re:protective order eNotice Certificate Attached
Image ID 001386956D01

10/03/2016 Motion-Consolidation
This action initiated by party Mark Mercer
CI 16 4659 CI 16 4798 CI 16 6760 CI 16 7277 / RT
Image ID N1627759MD01

09/29/2016 Motion Filed
This action initiated by party Cellco Partnership

re: enter stip prot order jm
Image ID N16273UD0D01

08/12/2016 Amended Notice of Hearing
This action initiated by party Unite Private Networks, LLC
#316 11-7-16 1:15 PM jm
Image ID N16225VVG0D01

08/08/2016 Motion-Compe1
This action initiated by party Unite Private Networks, LLC
RE: MUDS Compliance with Subpoena / RT
Image ID N1622192AD01

06/22/2016 Answer
This action initiated by party North Central Services, Inc.
kr

Image ID N16174DR6D01

06/22/2016 Answer
This action initiated by party Cellco Partnership
kr
Image ID N16174DCED01

06/22/2016 Answer
This action initiated by party Unite Private Networks, LLC
jm
Image ID N16174CN6D01

05/31/2016 Return Summons/Alias Summons
The document number is 00384140
MM
Served 05/23/2016, Certified Mail

Image ID N161522SQD01

05/31/2016 Return Summons/Alias Summons
The document number is 00384139
MM
Served 05/23/2016, Certified Mail
Image ID N161522S8D01

05/31/2016 Return Summons/Alias Summons
The document number is 00384138
MM
Served 05/23/2016, Certified Mail
Image ID N161522QWD01

05/04/2016 Summons Issued on Cellco Partnership
The document number is 00384140

E-MAILED: amo@ldmlaw.com
Image ID D00384140D01

05/04/2016 Summons Issued on Unite Private Networks, LLC
The document number is 00384139
E-MAILED: amo@ldmlaw.com
Image ID D00384139D01

05/04/2016 Summons Issued on North Central Services, Inc.
The document number is 00384138
E-MAILED: amo@ldmlaw.com
Image ID D00384138D01

05/03/2016 Praecipe-Summons/Alias
This action initiated by party Vera Mercer
s1

Image ID N16124BDKD01

04/13/2016 Complaint-Praecipe
This action initiated by party Mark Mercer
ts no praecipe filed
Image ID N161044RID01

Judges Notes

12/21/2016
Burns, Timothy, P.
Hearing held - Leslie Anderson: court reporter. All parties appeared
by counsel.
Protective Order entered on 10-4-16 applies to all parties and in all
consolidated actions.
Plaintiff in CI 16-4798 given leave to file a 2nd amended complaint w/i
14 days. Defendants given 20 days to file a response.
MUD's Motion to Quash is sustained - Mike Coyle to submit order.
Motion to Compel is taken under advisement.
01/04/2017
Burns, Timothy, P.
Signed order on motion to compel. Copy emailed to counsel.
03/24/2017
Burns, Timothy, P.
Hearing held on Plaintiff's Motions for Leave to File Amended
Complaints - Leslie Anderson: court reporter. All parties appeared by
counsel. Orders signed.
Matter set for PT/Status Check/Sched Conference on June 29, 2017 at
3:30 p.m.
09/27/2017
Burns, Timothy, P.
signed order for leave to intervene.
10/05/2017
Burns, Timothy, P.
Motion to intervene sustained - Earl "Chip" Greene to submit order.
10/11/2017
Burns, Timothy, P.
signed order
01/31/2018
Burns, Timothy, P.
signed order.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MARK MERCER, individually; VERA
MERCER, individually; and MERCER
MANAGEMENT COMPANY, a Nebraska
Corporation,

Plaintiffs,

v.

METROPOLITAN UTILITIES DISTRICT, a
Nebraska metropolitan utility district, NORTH
CENTRAL SERVICE, INC., a Minnesota
corporation, UNITE PRIVATE NETWORKS,
LLC, a Delaware limited liability company,
CELLCO PARTNERSHIP, a Delaware
partnership d/b/a VERIZON WIRELESS, a
Delaware Partnership,

Defendants.

CASE NO. CI 16-3120 ✓

#6 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
AUG 16 2017
JOHN M. FRIEND
CLERK DISTRICT COURT

M'S, INC., a Nebraska Corporation, d/b/a M'S
PUB,

Plaintiffs,

v.

NORTH CENTRAL SERVICE, INC., a
Minnesota corporation, UNITE PRIVATE
NETWORKS, LLC, a Delaware limited
liability company, CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS a Delaware
Partnership; and VERIZON WIRELESS,
INC., a Delaware corporation,
METROPOLITAN UTILITIES DISTRICT, a
Political Subdivision, and CITY OF OMAHA,
a Municipal Corporation

Defendants.

CASE NO. CI 16-4659



001541219D01

STEVEN LEFLER; REBECCA)
KEATINGLEFLER; MICHAEL S.)
MCMILLAN; JORGE GIL-CORDERO;)
MARSHA CONGDON; THE MARSHA B.)
CONGDON REVOCABLE TRUST DATED)
DECEMBER 22, 1994, MARSHA B.)
CONGDON, TRUSTEE; BRUCE BELGUM;)
KATHLEEN A. NEVINS; GAVIN R.)
NEVINS; THE GAVIN R. NEVINS AND)
KATHLEEN A. NEVINS REVOCABLE)
TRUST DATED JANUARY 4, 2006, GAVIN)
AND KATHLEEN NEVINS, TRUSTEES;)
MIQUEL DACCARETT; ABBY)
LANKHORST; MARILYN TOURTELLOT;)
SHAWN BUSHOUSE; ROBERT)
MINCHOW; ELIZABETH BURR; DAN,)
TRESA AND LINDSEY KLOTZ; MICHAEL)
SALERNO; GEORGE A. SUTERA; SCOTT)
SASSER; and TORY BISHOP)

Plaintiffs,)

v.)

NORTH CENTRAL SERVICES, INC.,)
UNITE PRIVATE NETWORKS, LLC;)
CELLCO PARTNERSHIP D/B/A VERIZON)
WIRELESS; METROPOLITAN UTILITIES)
DISTRICT, a Nebraska Metropolitan Utility)
District)

Defendants.)

CASE NO. CI 16-4798

NOUVELLE EVE, INC., a Nebraska corporation, and SUSANNE KEUCK, an individual,

Plaintiffs,

v.

NORTH CENTRAL SERVICES, INC., a Minnesota corporation; UNITE PRIVATE NETWORKS, LLC, a Delaware Limited Liability Company; CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, a Delaware Partnership, VERIZON WIRELESS, INC., a Delaware corporation, and METROPOLITAN UTILITIES DISTRICT, a Political Subdivision,

Defendants.

CASE NO. CI 16-6760

OLD MARKET NICHE, INC., a Nebraska corporation; OLD MARKET HABITAT, INC., a Nebraska corporation; RICHARD J. ANDERSON, individually, and KYLE ROBINO, individually,

Plaintiffs,

v.

NORTH CENTRAL SERVICES, INC., a Minnesota corporation; UNITE PRIVATE NETWORKS, LLC, a Delaware Limited Liability Company; CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, a Delaware Partnership; and METROPOLITAN UTILITIES DISTRICT, a Political Subdivision,

Defendants.

CASE NO. CI 16-7277

COLUMBIA NATIONAL INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
NORTH CENTRAL SERVICES, INC., a)
Minnesota corporation; UNITE PRIVATE)
NETWORKS, LLC, a Delaware Limited)
Liability Company; CELLCO)
PARTNERSHIP d/b/a VERIZON)
WIRELESS, a Delaware Partnership; and)
METROPOLITAN UTILITIES DISTRICT, a)
Political Subdivision,)
)
Defendants.)
)
)
_____)

CASE NO. CI 16-7667

ORDER ON DEFENDANTS’ MOTIONS TO DISMISS

This matter comes before the Court on Metropolitan Utility District’s (“MUD”) motions to dismiss in cases CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667 pursuant to Neb. Ct. R. Pldg. §§ 6-1112(b)(6) and (b)(7). Defendants North Central Services, Inc. (“NCS”), Unite Private Networks, LLC (“UPN”), and Cellco Partnership, d/b/a Verizon Wireless (“VZW”) also bring motions to dismiss in CI 16-7667 pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(7). Following a hearing on May 30, 2017, the matter was taken under advisement. Being fully advised, the Court finds and orders as follows:

FACTS AND PROCEDURAL HISTORY

A considerable portion of the facts and procedural history of the underlying case were set forth at length in the Court’s April 26, 2017, Order on Defendants’ Motion to Dismiss and are

incorporated herein by reference. In addition to the incorporated facts and procedural history, the Court notes the following salient facts:

Columbia National Insurance Company (“Columbia”) is a domestic corporation with its principal place of business in Nebraska and is licensed to issue insurance, including property and casualty insurance, to its insureds. (CI 16-7667, Am. Compl. ¶ 1). At all times relevant to the present matter, Columbia insured real property owned by Mercer Management Company and also insured personal property owned by Old Omaha Association, Inc. (CI 16-7667, Am. Compl. ¶¶ 2-3). As a result of the Old Market fire on January 9, 2016, Mercer Management Company suffered losses far exceeding its policy limits with Columbia. (CI 16-7667, Am. Compl. ¶ 22). Mercer Management Company is a named plaintiff in a separate suit against NCS, UPN, VZW, and MUD. (CI 16-3120). The January 9, 2016, fire also caused Old Omaha Association to lose a significant amount of its property that was covered by its insurance policy with Columbia. (CI 16-7667, Am. Compl. ¶ 22). To date, Old Omaha Association is not a named plaintiff in any suit concerning the Old Market fire on January 9, 2016. Columbia has made policy payments in excess of \$2,600,000.00 to Mercer Management Company and Old Omaha Association. (CI 16-7667, Am. Compl. ¶ 23). Columbia now asserts negligence and strict liability claims against NCS, UPN, VZW, and MUD. (CI 16-7667).

In its motions to dismiss, MUD asserts: (i) the strict liability claims leveled against it in CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667 should be dismissed pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6); (ii) certain negligence claims in CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667 relate to MUD’s discretionary decisions and should be dismissed pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6); and (iii) the claims alleging interference with contract rights in CI 16-3120, CI 16-4659, CI 16-6760, and CI 16-7277

should be dismissed pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). UPN, NCS, VZW, and MUD, NCS, UPN, and VZW, (collectively “Defendants”) move to dismiss Columbia’s cause of action in CI 16-7667 pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(7) and Neb. Rev. Stat. § 25-323.

STANDARD OF REVIEW

Neb. Ct. R. Pldg. § 6-1112(b)(6) Failure to State a Claim

On a motion made under Neb. Ct. R. § 6-1112(b)(6), the court accepts the plaintiff’s allegations in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 375, 754 N.W.2d 607, 610 (2008). Complaints should be liberally construed in the plaintiff’s favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 445-46, 778 N.W.2d 115, 118 (2010). Dismissal under Neb. Ct. R. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Doe v. Bd. of Regents of Univ. of Nebraska*, 280 Neb. 492, 499, 788, N.W.2d 264, 274 (2010).

A motion to dismiss tests the legal sufficiency of the complaint and therefore a court may typically only look at the face of the complaint to decide the motion. *DMK Biodiesel, L.L.C. v. McCoy*, 285 Neb. 974, 978-79, 830 N.W.2d 490, 495 (2013). While trial courts “generally must ignore materials outside the pleadings, [the court] may consider some materials that are part of the public record or do not contradict the complaint, as well as matters that are necessarily embraced by the pleadings.” *Id.*, 285 Neb. at 980, 830 N.W.2d at 496. For a document outside the pleadings to be embraced by the pleadings, it “must be referred to in the complaint and must be central to

the plaintiff's claim." *Id.* "A prime example of documents 'necessarily embraced' by a pleading is a written contract in a case that involves a dispute over the terms of the contract." *Id.*, 285 Neb. at 980-81, 830 N.W.2d at 496.

Neb. Ct. R. Pldg. § 6-1112(b)(7) Failure to Join a Necessary Party

"The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest that would be affected by the judgment." *Pestal v. Malone*, 275 Neb. 891, 894, 750 N.W.2d 350, 354 (2008).

An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Ruzicka v. Ruzicka, 262 Neb. 824, 837, 635 N.W.2d 528, 538 (2001).

Nebraska's rules regarding pleadings in civil actions are modeled after the Federal Rules of Civil Procedure and Nebraska courts look to federal decisions for guidance. *Ichtertz v. Orthopaedic Specialists of Neb., P.C.*, 273 Neb. 466, 470, 730 N.W.2d 798, 803 (2007). In a federal Rule 12(b)(7) motion to dismiss for failure to join a necessary party, the court accepts the allegations in the complaint as true and the Rule 12(b)(7) movant bears the burden of demonstrating that the absent party is a necessary party that must be joined. *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 479 n.2 (7th Cir. 2001); *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994); *Ochs v. Hindman*, 984 F. Supp. 2d 903, 906 (N.D. Ill. 2013).

RULING ON EXHIBIT 3

At the hearing on May 30, 2017, MUD offered as evidence the notice of tort claim which Columbia submitted to MUD pursuant to Neb. Rev. Stat. § 13-905. (Exhibit 3). In its April 26, 2017, Order, the Court considered similar § 13-905 written notices. The Court's prior consideration of § 13-905 notices, however, must be viewed in the proper context. The Court reviewed the written notices in the context of MUD's motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) which asserted a factual attack to this Court's subject matter jurisdiction. In a factual attack the court may consider matters outside the pleadings and is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *See Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990).

MUD brings its current motions to dismiss in CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667 pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) and (b)(7). For purposes of MUD's motions premised on § 6-1112(b)(6), the Court may only look at the face of the complaint. *DMK Biodiesel*, 285 Neb. at 978-79, 830 N.W.2d at 495. While trial courts "generally must ignore materials outside the pleadings, [the court] may consider some materials that are part of the public record or do not contradict the complaint, as well as matters that are necessarily embraced by the pleadings." *Id.*, 285 Neb. at 980, 830 N.W.2d at 496. For a document outside the pleadings to be embraced by the pleadings, it "must be referred to in the complaint and must be central to the plaintiff's claim." *Id.* Although Columbia references the written notice in its Complaint, the notice is not central to Columbia's underlying claims of negligence and strict liability. Columbia's written notice to MUD is not akin to the archetypal written contract's centrality to a claim premised on breach of contract. Consequently, Columbia's written notice to

MUD is not embraced by the pleadings and Exhibit 3 is not received for purposes of MUD's § 6-1112(b)(6) motions.

Columbia's written notice may, however, be considered for purposes of MUD's § 6-1112(b)(7) motion in CI 16-7667. Matters outside the pleadings can be considered on such a motion. Nebraska's rules regarding pleadings in civil actions are modeled after the Federal Rules of Civil Procedure and Nebraska courts look to federal decisions for guidance. *Ichtertz*, 273 Neb. at 470, 730 N.W.2d at 803. In considering Rule 12(b)(7) motions, federal courts have received and weighed materials outside the pleadings without converting the motion to dismiss into a motion for summary judgment. *Three Affiliated Tribes of Fort Berthold Indian Reservation v. U.S.*, 637, F. Supp. 2d 25, 29 (D.D.C. 2009); *Raytheon Co. v. Cont'l Cas. Co.*, 123 F. Supp. 2d 22, 32 (D. Mass. 2000); *Reefer Sys., Inc. v. Southard Fin., LLC*, No. 8:16 CV 93, at *4, n.1 (D. Neb. Sept. 6, 2016). Accordingly, Exhibit 3 is received for purposes of MUD's § 6-1112(b)(7) motion.

ANALYSIS

A. MUD'S § 6-1112(b)(6) MOTION: STRICT LIABILITY

First, the Court addresses MUD's contention that the claims against MUD premised on strict liability must be dismissed. Although complaints should be liberally construed, the Nebraska Supreme Court has made clear that "complaints must set forth sufficient information to suggest that there is some *recognized* theory upon which relief may be granted." *Anderson v. Wells Fargo Fin. Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 603, 694 N.W.2d 625, 632 (2005); *Ferer v. Erickson & Sederstrom, P.C.*, 272 Neb. 113, 117, 718 N.W.2d 501, 506 (2006) (emphasis added). Nebraska has not yet recognized strict liability as a viable theory of recovery against public utilities. *Anderson v. Nashua Corp.*, 246 Neb. 420, 427, 519 N.W.2d 275, 281 (1994), overruled on other grounds by *Downey v. W. Cmty. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012);

Marmo v. IBP, Inc., 362 F. Supp. 2d 1129, 1131 (D. Neb. 2005). The absence of such recognition suggests a tacit adoption of the Restatement (Second) of Torts, § 521 which states that “strict liability for abnormally dangerous activities does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.” RESTATEMENT (SECOND) OF TORTS § 521 (1977).

Nebraska jurisprudence, replete with case law holding MUD and similarly situated natural gas suppliers to a negligence standard, supports this Court’s determination that strict liability for a public utility supplying natural gas is not a recognized theory upon which relief may be granted. See *Lemke v. Metro. Utilities. Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993); *Hammond v. Nebraska Natural Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979); *Whittington v. Neb. Natural Gas Co.*, 177 Neb. 264, 128 N.W.2d 795 (1964); *Reed v. Metro. Utilities. Dist.*, 173 Neb. 854, 115 N.W.2d 453 (1962); *Daugherty v. Neb. Natural Gas Co.*, 173 Neb. 30, 112 N.W.2d 790 (1961). Accordingly, dismissal of the strict liability claims asserted against MUD in CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667 is appropriate and granted.

B. MUD’S § 6-1112(b)(6) MOTION: DISCRETIONARY FUNCTION EXCEPTION

MUD argues that certain negligence claims in CI 16-3120 (Am. Compl. ¶¶ 67(c), (d) (e), (f), (g)), CI 16-4659 (Am. Compl. ¶¶ 55(c), (d), (e), (f), (g), (k)), CI 16-4798 (Am. Compl. ¶¶ 64(c), (d), (e), (f), (g)), CI 16-6760 (Am. Compl. ¶¶ 62(c), (d), (e), (f), (h)), CI 16-7277 (Am. Compl. ¶¶ 71(c), (d), (e), (f), (g)), and CI 16-7667 (Am. Compl. ¶¶ 44(d), (e), (f), (g)) implicate the discretionary function exception to the Political Subdivisions Tort Claims Act (“PSTCA”) and should be dismissed. A political subdivision retains its sovereign immunity with respect to certain exceptions in the PSTCA. Neb. Rev. Stat. § 13-910. The exceptions set forth in § 13-910 are affirmative sovereign immunity defenses to claims brought under the PSTCA. *Harris v. Omaha*

Hous. Auth., 269 Neb. 981, 988, 698 N.W.2d 58, 65 (2005). If a political subdivision proves that a plaintiff's claim falls within a § 13-910 exception, then the claim fails based on sovereign immunity, and the political subdivision is not liable. *Id.*

Section 13-910(2) provides that the PSTCA shall not apply to “[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused.” Neb. Rev. Stat. § 13-910(2). This discretionary function exception extends only to basic policy decisions made in governmental activity at the operational level, and not to ministerial activities implementing such policy decisions. *McGauley v. Washington Cnty.*, 297 Neb. 134, 139, 897 N.W.2d 851, (2017). The purpose of the discretionary function exception is to prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Id.* A two-step analysis is employed to determine whether the discretionary function exception to the PSTCA is applicable. *Kimminau v. City of Hastings*, 291 Neb. 133, 145, 864 N.W.2d 399, 410 (2015). First, a court considers whether the action is a matter of choice for the acting employee. *Id.* If the court concludes that the contested action involves an element of judgment, then the court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. *Id.*

Examples of discretionary functions include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 192, 609 N.W.2d 338, 345-46 (2000). “The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.” *Parker v. Lancaster Cnty. Sch. Dist. No. 001*, 256 Neb. 406, 417, 591 N.W.2d 532, 540 (1999).

The issue confronting the Court is whether the applicability of the discretionary function exception is necessarily apparent on the face of the complaints so as to require dismissal. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 86, 89, 727 N.W.2d 447, 454, 456 (2007). When the facts are undisputed, determining whether the discretionary function exception applies is a question of law. *Parker v. Lancaster Cnty. Sch. Dist. No. 001*, 256 Neb. at 416, 591 N.W.2d at 540. “By the same token, however, it is often difficult to undertake such an analysis without a complete factual record.” *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. at 90, 727 N.W.2d at 457. Indeed, “[g]reater factual specificity is the object of discovery.” *Id.* 273 Neb. at 85, 727 N.W.2d at 454.

The Court finds that it is unable to determine, from the face of the challenged complaints, whether the alleged negligence involved discretionary policy-level decision-making or operational-level conduct. Without evidence concerning the contested policies, the Court is unable to engage in the proper two-step analysis to determine the applicability of the discretionary function exception. An adequate factual record will need to be developed to distinguish policy decisions from ministerial decisions. As such, MUD’s motions to dismiss certain negligence claims in CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667 pursuant to the discretionary function exception found in Neb. Rev. Stat. § 13-910(2) are denied.

C. MUD’S § 6-1112(b)(6) MOTION: INTERFERENCE WITH CONTRACT RIGHTS

MUD contends that certain negligence claims lodged against it in CI 16-3120 (Am. Compl. ¶¶ 70 and 74), CI 16-4659 (Am. Compl. §§ 58 and 61), CI 16-6760 (Am. Compl. ¶¶ 65 and 71), and CI 16-7277 (Am. Compl. ¶¶ 74 and 78) are in essence claims for interference with contract rights which are exempted from the PSTCA by Neb. Rev. Stat. § 13-910(7). The PSTCA does not apply to “[a]ny claim *arising out of* assault, battery, false arrest, false imprisonment, malicious

prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights.*” Neb. Rev. Stat. § 13-910(7) (emphasis added).

In reviewing the complaints, the Court concludes that the contested allegations do not fall within the ambit of § 13-910(7). The challenged allegations in CI 16-3120 state, in part, “[a]s a direct and proximate result of MUD’s acts and omissions, Plaintiffs have sustained property damage, as well as business disruption and economic losses.” (CI 16-3120, Am. Compl. ¶¶ 70 and 74). Similarly, the disputed allegations in CI 16-4659 state, in part, “[a]s a direct and proximate result of MUD’s acts and omissions, Plaintiff has sustained property damages, loss of inventory, furnishings, appliances, equipment, fixtures and personal property as well as business disruption, lost profits, loss of goodwill, costs of reconstruction, and additional economic losses . . .” (CI 16-4659, Am. Compl. ¶¶ 62 and 65). The Second Amended Complaint in CI 16-6760 alleges, in part, “[a]s a direct and proximate result of MUD’s acts and omissions, Plaintiffs have sustained property damage of not less than \$1,000,000, as well as business disruption and economic losses, inclusive of \$42,000 in lost profits monthly from January 9, 2016, to the present and continuing indefinitely, and other economic losses.” (CI 16-6760, Second Am. Compl. ¶¶ 72 and 78). The Amended Complaint in CI 16-7277 asserts “[a]s a direct and proximate result of MUD’s acts and omissions, Plaintiffs have sustained property damage, as well as business disruption, loss of net profits, and other economic losses.” (CI 16-7277, Am. Compl. ¶¶ 74 and 78). It is evident from the faces of the complaints that the plaintiffs do not allege their claims *arise out of* an attempt by MUD to interfere with their contract rights.

To establish a cause of action for tortious interference with contract under Nebraska law, plaintiffs must prove:

(1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

Huff v. Swartz, 258 Neb. 820, 825, 606 N.W.2d 461, 466 (2000).

Here, plaintiffs do not contend that MUD intentionally interfered with their business enterprises. Nor is this an instance in which the plaintiffs, through semantics or clever pleading, attempt to reframe their causes of action to circumvent a delineated exemption in § 13-910(7). Rather, these cases concern allegations that MUD acted negligently and the concomitant business disruptions simply constitute damages stemming from the underlying negligence. Where, as here, the gravamen of a complaint is negligence, MUD may not rely on the interference with contract rights exemption in § 13-910(7) to bar portions of plaintiffs' claims. *See Wickersham v. State*, 218 Neb. 175, 182, 354 N.W.2d 134, 140 (1984) (stating that where the thrust of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exception in the State Tort Claims Act) *disapproved on other grounds*, *D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997). As such, MUD's assertion that certain portions of CI 16-3120, CI 16-4659, CI 16-6760, and CI 16-7277 should be dismissed pursuant to Neb. Rev. Stat. § 13-910(7) is unavailing.

D. DEFENDANTS' § 6-1112(b)(7) MOTIONS: NECESSARY PARTIES IN CI 16-7667

Defendants NCS, UPN, VZW, and MUD move to dismiss Columbia's cause of action in CI 16-7667 pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(7) and Neb. Rev. Stat. § 25-323 for failing to join necessary parties. To reiterate, Columbia insured real property owned by Mercer Management Company and also insured personal property owned by Old Omaha Association, Inc.

(CI 16-7667, Am. Compl. ¶¶ 2-3). Mercer Management Company is a named plaintiff in a separate suit against NCS, UPN, VZW, and MUD. (CI 16-3120). To date, Old Omaha Association is not a named plaintiff in any suit concerning the Old Market fire on January 9, 2016. Columbia has made policy payments in excess of \$2,600,000.00 to Mercer Management Company and Old Omaha Association. (CI 16-7667, Am. Compl. ¶ 23). The Court will first address the status of Mercer Management Company, followed by the Old Omaha Association.

Rendering a judgment in CI 16-7667 without addressing Mercer Management Company would leave the controversy unresolved and would be inconsistent with equity and good conscience. Thus, Mercer Management Company is a necessary party. As such, the Court must determine the appropriate manner in which to move CI 16-7667 and CI 16-3120 forward.

In *Krause v. State Farm Mutual Automobile Insurance Company*, the Nebraska Supreme Court addressed this issue and determined that “Nebraska is in harmony with the prevailing rule in most jurisdictions that the insured’s cause of action against the tort-feasor cannot be split and that at all times there is one cause of action on the part of the insured against the tort-feasor.” *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 591, 169 N.W.2d 601, 603 (1969). Accordingly, “[w]hen the indemnity paid by the insurer covers only part of the loss . . . leaving a residue to be made good to the insured by the wrongdoer, the right of action remains in the insured for the entire loss.” *Id.*, 184 Neb. at 593, 169 N.W.2d at 604. The insured acts as trustee for his or her insurer and holds the amount of recovery equal to the indemnity for the insurer. This approach evades claim splitting, it assures the tortfeasor that he or she will not be confronted with a multiplicity of suits, and it is premised on the principle that “the wrongful act was single and indivisible and gives rise to but one liability.” *Id.*

Consequently, the right of action remains with Mercer Management Company and Columbia is precluded from splitting the claim by simultaneously bringing suit in its own name. Columbia's claim in CI 16-7667 cannot encompass damages sustained by Mercer Management Company. Instead, Columbia may safeguard its subrogation rights by intervening in CI 16-3120 pursuant to Neb. Rev. Stat. § 25-328.

Regarding Columbia's insured Old Omaha Association, Exhibit 3 asserts that Old Omaha Association's damages exceed its policy payments from Columbia by at least \$90,156.26. (Ex. 3, pg. 2). Although suggestive, this is insufficient to satisfy the Defendants' burden of showing that Old Omaha Association is a necessary party. At this juncture it is unclear whether the figures provided in Exhibit 3 are accurate, whether Old Omaha Association considers itself fully indemnified, and whether Columbia is fully subrogated and thus able to bring CI 16-7667 in its own name. *See Cont'l W. Ins. Co. v. Swartzendruber*, 253 Neb. 365, 371-72, 570 N.W.2d 708, 712 (1997); *Jelinek v. Neb. Natural Gas Co.*, 196 Neb. 488, 490, 243 N.W.2d 778, 779 (1976). For purposes of a motion to dismiss for failure to join a necessary party, the Court must accept the allegations in Columbia's Amended Complaint as true. *Davis Companies*, 268 F.3d at 479 n.2. Dismissing Columbia's claim for failure to join a necessary party is not appropriate at this time. Defendants may, however, reassert a § 6-1112(b)(7) motion if additional presentation of evidence will satisfy their burden. *Raytheon*, 123 F. Supp. 2d at 33 n.9 (“[a] denial of Rule 12(b)(7) motion is without prejudice. Thus, [Defendant] can renew the motion if discovery warrants a renewed request.”). Until that time, Defendants' § 6-1112(b)(7) motions are premature and are denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Metropolitan Utilities District's motions to dismiss the strict liability claims lodged against it in CI 16-3120, CI

16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6), are **granted with prejudice**.

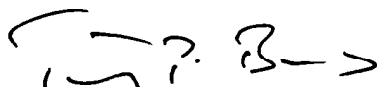
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Metropolitan Utilities District's motions to dismiss certain negligence claims in CI 16-3120, CI 16-4659, CI 16-4798, CI 16-6760, CI 16-7277, and CI 16-7667, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) and the discretionary function exception provided by Neb. Rev. Stat. § 13-910(2), are **denied**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Metropolitan Utilities District's motions to dismiss the claims alleging interference with contract rights in CI 16-3120, CI 16-4659, CI 16-6760, and CI 16-7277, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) and Neb. Rev. Stat. § 13-910(7), are **denied**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that North Central Service, Inc., Unite Private Networks, LLC, Cellco Partnership, d/b/a Verizon Wireless, and Metropolitan Utilities District's motions to dismiss in CI 16-7667, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(7) and Neb. Rev. Stat. § 25-323, are **granted in part and denied in part without prejudice**.

DATED this 15th day of August, 2017.

BY THE COURT:



TIMOTHY P. BURNS
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 17, 2017 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

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Date: August 17, 2017

BY THE COURT:

John M. Friend
CLERK

