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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Application (CDUA) (HA-3568) The Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 **TEMPLE OF LONO EMERGENCY MOTION TO BOARD TO STAY PROCEEDINGS; MEMORANDUM IN SUPPORT; COS**

TEMPLE OF LONO EMERGENCY MOTION TO BOARD TO STAY PROCEEDINGS

Now comes the Temple of Lono and moves the Board of Land and Natural Resources to stay the proceedings in the above-referenced contested case until such time as the Board can determine whether the current process in the proceeding is in compliance with applicable rules and does not unconstitutionally deny due process.

The Temple seeks this stay because the Temple considers the process for determining the record in the proceeding to be clearly unconstitutional and highly prejudicial to the parties.

The Temple also seeks this stay because the scheduling orders issued by the Hearing Officer conflict with the applicable administrative rule and create an impossible burden on parties to continue litigation regarding the final record while preparing findings of fact and conclusions of law supposedly based on the final record.

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 April 27 12:50 pm

The Temple submits its memorandum in support of this motion.

DATED: April 27, 2017

_____/s/_____
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TEMPLE OF LONO MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION TO BOARD TO STAY PROCEEDINGS

I. INTRODUCTION

The Contested Case Hearing (CCH) in this proceeding completed the testimony phase on March 2, 2017.

The Hearing Officer orally set the following schedule:

March 9, 2017 Filing motions to admit exhibits

March 16, 2017 Filing objections to exhibit admissions

March 23, 2017 Issuance of Minute Order ruling on exhibit admissions[1]

On April 19, 2016, the Hearing Officer issued Minute Order 43 (Setting Post-Hearing Deadlines), DOC-552 ("Order 43"). This order set the following schedule:

[1] This Minute Order did not issue until April 20, 2017 (Minute Order 44)
[2] The Applicant does not say that it is unable to determine whether to object to hundreds of more exhibits. The Applicant says it is unable to determine the appropriate objections to make.
[3] The transcripts are available only in hard copy, not in a searchable format, and

May 30, 2017	Proposed decision and order, findings of fact and conclusions of law
June 13, 2017	Responses to proposed decision and order, findings of fact and conclusions of law

On April 20, 2017, the Hearing Officer issued Minute Order 44 (Documentary Evidence), DOC-553 ("Order 44"). The Order ruled on the admissibility of numerous documents. Ibid at 6-60. The Order provided 5 business days from the day the order issued to file motions to reconsider. Ibid. at 8. The Order also provided 5 business days from the day a motion for reconsideration is filed to file a response. Id.

This scheduling is a reflection of either fatal procedural errors on the part of the Hearing Officer or of the implementation of a deliberate plan on the part of the Hearing Officer that severely prejudices parties to this proceeding.

The Temple of Lono seeks a stay that would allow the Board to review the decisions by the Hearing Officer regarding the setting of schedules and the admission of exhibits to determine whether those decisions violated the constitutional guarantee of due process and impose undue hardship on the parties.

Allowing the process to continue will inflict significant harm to parties prejudiced by the Hearing Officer's decisions. That harm may take the form of (1) being forced to prepare findings of fact and conclusions of law before the record is complete, in violation of the applicable rule; (2) being forced to defend the admissibility of exhibits after being expressly prevented from making a record on the admissibility of the exhibits, in violation of due process rights; (3) being unable to make the party's case because so many exhibits have been denied admission through no fault of the exhibit's sponsors, in violation of due process rights; or

(4) being forced to prepare findings of fact and conclusions of law on a schedule that is totally unrealistic given the volume, extent, and complexity of the proceeding record and while unresolved matters are still being litigated, in violation of due process rights.

The Temple makes its motion to stay to provide the Board time to evaluate whether the proceeding has entered a dead end canyon from which there is no exit or can be salvaged by Board intervention.

II. ARGUMENT

A. The Hearing Officer ignored the rules in setting a schedule for the preparation of findings of fact and conclusions of law.

1. The Hearing Officer refuses to acknowledge that the record is incomplete.

Order 43 states that the deadlines for filing proposed decisions and orders is "[b]ased upon HAR §13-1-38(a), all applicable law, and **the entire record**." Ibid. at 2 (emphasis added). The "entire record," however, is not determined.

Subsequent to issuing Order 43, the Hearing Officer issued Order 44. DOC-553. That Minute Order made rulings on innumerable objections to the admission of pre-filed testimony and exhibits. Ibid. at 6-60.

Order 44 also provided for the filing of motions to reconsider the rulings. Ibid. at 8.

Obviously, until all issues regarding which exhibits will be admitted as evidence are resolved, there is no final record. As far as existing objections, that resolution will not come at least until the motions for reconsideration are resolved.

In explaining why an order scheduled to be issued on March 23, was not issued, the Hearing Officer acknowledged that "the volume, extent and complexity of

the exhibits, motions and responses necessitated significantly more time than anticipated." Order 44 at 1. The Hearing Officer will now have to again address that extensive record as the motions to reconsider are filed. See e.g. Temple of Lono Motion for Reconsideration of Minute Order 44. DOC-569.

Having issued both Order 43 and Order 44 one day apart, the Hearing Officer still refuses to acknowledge that the record is incomplete and HAR §13-1-38(a) is, therefore, not applicable to the current status of the contested case.

In addition, the existing objections may not necessarily be all the objections that will be filed. When the Applicant filed its objections on March 16, it stated:

> Because the transcripts of the evidentiary hearings remain incomplete as of the filing date of this opposition, the University is still unable to determine with certainty the appropriate **objections[2] to hundreds of exhibits sought to be introduced through the parties' motions.** As such, the University hereby asserts each of its General Objections to any exhibits and written direct testimony to the extent applicable, and reserves the right to object further as transcripts become available.

DOC-514 [University of Hawai'i at Hilo's Opposition to Motions to Admit Exhibits and Written Direct Testimony dated March 16, 2017 ("UHH Obj.")] at 3.

The transcripts did not become available until April 18, 2017. DOC-551 (Memorandum on contested case transcripts; Index to transcripts for Contested Case HA-16-02).[3]

The Hearing Officer has not addressed the Applicant reserving the right to filed additional objections after the transcripts were final. While that possibility is

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[2] The Applicant does not say that it is unable to determine whether to object to hundreds of more exhibits. The Applicant says it is unable to determine the appropriate objections to make.

[3] The transcripts are available only in hard copy, not in a searchable format, and only during library hours. DOC-551. The 51 transcript volumes cover 7 pre-hearing conferences and 44 days of hearings.

still pending, the record is neither complete nor final.[4]

2. There are motions pending.

The Temple of Lono's participation in this proceeding is replete with instances where the Temple filed a motion and the Hearing Officer simply ignored the motion. See e.g. DOC-324 (Motion to Schedule Unscheduled Motions).

The motions not ruled upon are substantive and some of them are potentially dispositive of this case. Id.

The failure of the Hearing Officer to rule on those pending motions means that the record is incomplete.

3. At least one pending motion would be dispositive of the entire case.

On March 19, 2017, the Temple of Lono filed a motion to the Board seeking dismissal of this entire proceeding. DOC-516. Other interveners joined in that motion. DOCs 518 (Fergerstrom), 523 (William Freitas), 529 (Cindy Freitas), 531 Kanaele), 537 (Ching), 542 (Pisciotta, Anaina Hou, Neves), 543 (Ward).

The Board has never ruled on that motion.

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[4] At least one party intends to continue litigating the issue of exhibit admissibility into the findings of fact and conclusions of law phase of this proceeding.

> By not objecting to the admission of a particular exhibit or written direct testimony, TIO is not waiving and instead hereby expressly reserves its right to later argue in connection with the proposed Findings of Fact and Conclusions of Law ("FOFs and COLs") that any such exhibit or written direct testimony is irrelevant, immaterial, not credible, or should otherwise not be considered by the Hearings Officer.

DOC-511 [TMT International Observatory, LLC's Memorandum in Opposition to Motions to Admit Exhibits and Written Testimony dated March 16, 2017 ("TIO Obj.")] at 3.

This reservation makes the Hearing Officer's March 16, 2017 "deadline" for the filing of objections, see Order 44 at 1, a meaningless deadline The Hearing Officer is encouraging such open-ended litigation. Order 44 at 7 ("Parties may still argue that evidence, although received, should be disregarded.")

Obviously, an affirmative ruling on that motion would have a substantial impact on the record, i.e. there would be no record. The record cannot be complete until that motion is ruled upon.

Also, before spending innumerable hours preparing proposed decisions and orders, findings of fact, and conclusions of law, the parties are entitled to know whether the proceeding is going to be dismissed.

The failure of the Board to respond to the motion to dismiss constitutes a violation of due process.

For the Hearing Officer to ignore the pending motion to dismiss and proceed to order the parties to prepare proposed decisions and orders anyway is simply another due process violation.

4. The determination of what constitutes evidence in this proceeding is still underway.

While the Hearing Officer has entered rulings on almost all of the exhibits as to their admissibility, the time for reconsideration has just begun. Order 44 at 8. Given the innumerable exhibits facing objections, see Order 44, those decisions could potentially have a major impact on the final record, tossing out whole segments of a party's case or admitting numerous documents now under a cloud of objection.

HAR §13-1-38 begins **"[a]fter all the evidence has been taken in** …." (emphasis added). There are no final rulings on the admissibility of numerous exhibits and related documents. Whether those challenged documents will eventually be evidence or excluded is yet to be determined. All the evidence has not,

therefore, "been taken in" because decisions on admissibility are still subject to motions to reconsider. Application of HAR §13-1-38(a) is premature.[5]

To prematurely require the parties to prepare findings of fact and conclusions of law based on an incomplete record violates HAR §13-1-38.

5. Setting the schedule in violation of HAR §13-1-38 is a due process violation.

The Hearing Officer improperly imposed a schedule for proposed decisions, orders, findings of fact, and conclusions of law. While specifically citing the applicable rule, the Hearing Officer ignored the provision of the rule requiring the record to be complete as a prerequisite for application of the rule. The imposition of a schedule under these circumstances violated the due process rights of the parties.

The cure for this violation is to withdraw the scheduling order related to the findings of fact and conclusions of law.

6. The illegal schedule is also unduly restrictive as to the time provided for filing of decisions, orders, findings of fact, and conclusions of law.

The schedule for filing proposed decisions, orders, findings of fact, and conclusions of law does not provide adequate time to the parties.

The Order sets May 30, 2017 as the deadline for filing.

As noted above, there are innumerable exhibits and related documents under challenge. Without knowing which exhibits will be admitted and which will not, the parties cannot prepare proposed decisions, orders, findings of fact, and conclusions of law. Clearly the purpose of HAR §13-1-38 was to define the point in the

[5] Of course, there are also the possible additional objections that the Applicant reserved the right to file as discussed above. Supra. at pages 4-5.

proceeding when setting the schedule for such filings was appropriate, i.e. after all the evidence was in.

The rationale for such a rule is apparent. As long as the record is not complete, the parties cannot prepare their filings with any confidence that the proof used will ultimately be admitted into evidence.

Conversely, with so many exhibits under challenge, preparing the proposed filings without using any of the challenged prefiled testimony or exhibits significantly handicaps the parties, particularly the parties whose prefiled testimony and/or exhibits face extensive challenges.

The emergence of the exhibits issue, see DOC-522 (Mauna Kea Anaina Hou motion requesting time to respond to exhibit objections and related matters), characterized by the Hearing Officer as involving significant "volume, extent and complexity," Order at 1, has required the parties to respond with numerous post-hearing filings addressing the issues. See DOCs-522, 524, 525, 526, 527, 528, 530, 532, 533, 535, 538, 539, 540, 541, 545, 546, 547 548, 550. The time being taken up by the exhibits issue is time taken away from preparing the proposed decisions and orders scheduled in Minute Order 43. That extra time being spent is directly attributable to the Hearing Officer's enunciation of a misleading exhibits process, as will be discussed below.

Rather than responding to the imposition of the exhibits complication with an expansion of time, the Hearing Officer set a schedule providing only six weeks from the date of the Order for the filing of the proposed decisions, orders, findings of

fact, and conclusions of law, with the time for addressing the exhibits issues included in that time frame.[6]

The parties are, therefore, obligated to prepare the proposed rulings without a final record, while also litigating what that final record will include.

That most of the Protector Intervenors[7] are *pro se* parties only compounds the injustice in the Hearing Officer's forced march to completion.

While due process violations in this proceeding are so frequent that they have become expected, this final attack by the Hearing Officer on the ability of the Protector Interveners to participate and make their case is so blatant that a motion to recuse would be warranted, if it were not for the fact that the Hearing Officer will simply ignore such a motion. See DOC-262 (Motion to Recuse Hearing Officer) never considered or ruled upon.

B. The Hearing Officer adopted a process for admitting exhibits that ended up violating the due process rights of all parties.

There is an open question whether the Hearing Officer designed a process for addressing exhibits which deliberately intended to prejudice the Protector Interveners or simply made a fatal procedural mistake, which the Hearing Officer is now trying to hide beneath a clearly unconstitutional process.

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[6] The Hearing Officer is apparently trying to satisfy the desire of the telescope proponents for a quick conclusion to this proceeding. The rights of the interveners to make the case for a recommendation to disapprove the application are being sacrificed to that goal.

[7] The term "Protector Intervenors" refers to those interveners who seek to prevent further desecration of Mauna Kea and includes all the parties except the Applicant, TMT International Observatory LLC (TIO), and Perpetuating Unique Education Opportunities, Inc.'s (PUEO).

The exhibits process had a bait and switch aspect to it. The Hearing Officer repeatedly expressed her "inclination" to take in all the proffered exhibits with very few exceptions. The Protector Interveners believed that would be the process, much to their detriment.

The process for admission of exhibits set forth by the Hearing Officer called for the parties to submit motions seeking such admission.

The parties did file such motions. DOCs 480, 481, 482, 483, 485, 486, 487, 488, 489, 491, 492, 493, 494, 495, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 517, 519. The Temple filed one such motion. DOC-491.

The Hearing Officer enunciated many times that she expected few objections because she intended to simply grant all such motions and then decide what weight to give to the exhibits admitted into evidence.

The process as defined by the Hearing Officer meant that parties did not spend time establishing the admissibility of an exhibit while the witness associated with the exhibit was testifying. There was, therefore, no record that could be cited to later argue for admissibility of the exhibit.

Moving to admit exhibits was specifically <u>not</u> a part of the witness phase of the proceeding. The Hearing Officer rejected any attempt to admit an exhibit into evidence during the testimony phase based on the "all in at the end" nature of the proceeding as defined by the Hearing Officer.

A second impact was that the sponsor of an exhibit had no reason to make an admissibility argument when moving, at the end of the hearing, to admit exhibits.

Not having developed a record to support admissibility, such an argument would have been difficult, if not impossible, to make.

The result of this process was that the parties made motions for the admission of exhibits in a *pro forma* fashion without arguing the admissibility of the individual documents. See e.g. DOC-491 (Temple of Lono motion to admit opening statement, pre-filed testimony, and exhibits into evidence citing applicable rules without making argument for admissibility of each document moved into evidence); see also DOC-506 (The University of Hawai'i at Hilo's supplemental motion to admit exhibits and written direct testimony into evidence and objection to admission of certain exhibits and written direct testimony moving exhibits into evidence based on generally applicable rules without providing exhibit-specific support for motion); DOC-451 (TMT International Observatory's motion to admit exhibits and written direct testimony into evidence citing generally the applicable statutes and rules without making any argument for the admissibility of each specific document); DOC-485 (Perpetual Unique Education Opportunities, Inc.'s Motion to Admit Written Direct Testimony and Exhibit making generic statement that all exhibits are admissible with references to applicable rules without making argument for the admissibility of each specific exhibit based on a record); DOC-502 (Mehana Kihoi's motion to admit exhibits and written direct testimony into evidence making generic reference to the relevant statute without making an argument for the admissibility of each specific exhibit).

The process as understood by some of the Protector Interveners was so automatic that they referenced exhibits *en masse*, rather than individually, which the

Hearing Officer then rejected. Order 44 at 7. Given the Hearing Officer's portrayal of the process of admission as basically automatic, moving in a group of exhibits *en masse* was not an unreasonable decision.[8]

The Hearing Officer, in almost all cases, therefore, had no initial exhibit-specific argument for admissibility from the exhibit sponsor to consider when deciding whether to receive a particular exhibit into evidence.

The parties facing objections had a rude awakening when the Hearing Officer decided to grant objections to exhibits before providing the parties any time to respond to objections by presenting arguments for admissibility. Order 44.

Even if the Hearing Officer had provided time to respond to objections, that allowance could not cure the problem created by the fact that admissibility of an exhibit could well depend on the testimony of the witness with whom the exhibit was associated. There was no reason or permission to seek such testimony when the witness was testifying and no opportunity to recall the witness once it became clear that the process was not going to be as portrayed repeatedly by the Hearing Officer.

Given that the process as described by the Hearing Officer meant that there was no reason for the parties to present arguments for admissibility of each document at the time motions to admit exhibits were filed, the proper procedure would have been (a) filing of motion to admit exhibit, (b) filing of objection to

[8] Acknowledging that the Hearing Officer did say that motions to admit exhibits should set out each exhibit individually, the *en masse* submission problem can be cured by the sponsor submitting an individualized list. See e.g. DOC-515. Allowing for such a correction is even more appropriate when the party is a *pro se* party.

admission, (c) filing a response to the objection,[9] (d) ruling by the Hearing Officer on each objection in an order that provided reasonable explanation for each ruling, (e) motions for reconsideration, (f) response to motion for reconsideration, and (g) final ruling.

As documented in Order 44, the Hearing Officer erroneously failed to provide time in the schedule for responses to objections to be filed. Order 44 at 1.

The process enunciated by the Hearing Officer might have worked had all parties fulfilled the Hearing Officer's expectations of few objections, if any.

Instead, the Applicant filed multiple objections to 237 exhibits, DOC-514, and TIO filed additional objections to 76 exhibits. DOC-511.

Once the reality of hundreds of objections emerged, Intervener Mauna Kea Anaina Hou filed its motion requesting time to respond to exhibit objections and related matters. DOC-522. Other interveners joined that motion. DOCs 524, 526, 527, 528, 530, 532, 535, 538, 539, 540, 541, 545.

The Hearing Officer never ruled on that motion.

The Temple filed a motion seeking a protective order "clarifying that there is no obligation on the part of parties whose testimony and exhibits have been subject to objections to file responses at this time." DOC-546. Other interveners joined in that motion. DOCs-547, 548.

The Hearing Officer never ruled on that motion.

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[9] Again noting that there was no reason for the sponsor of an exhibit to establish its admissibility at the time the associated witness was testifying. Any response to an objection later would be incurably handicapped by that absence of a reason or permission to create a record.

When parties attempted to respond to the objections anyway, the Hearing Officer refused to review or consider such responses because they were "late." Order at 6 *citing* DOCs-515, 520, 521, and 525. Responses to objections could not be "late" when there was no schedule for them to be filed in the first place.

As a result of all these factors, the Hearing Officer made all decisions on admissibility of exhibits subject to objections without the sponsor of the exhibit having an opportunity to present an initial argument for admissibility of the specific exhibit objected to or to be heard in response to the objection. The Hearing Officer essentially ruled on objections without hearing from the sponsor of the exhibit objected to – the classic "cart before the horse" problem so familiar to this proceeding. See *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 363 P.3d 224, (2015).

Misleading parties into not establishing the admissibility of documents when the related witness was testifying was a due process violation.

Not providing the exhibit sponsors time to respond to objections prior to the Hearing Officer ruling on the objections was another due process violation.

Relegating all responses to objections to the reconsideration process denied those now responding the opportunity to present arguments for reconsideration of an initial order based on a process in which all parties participated. That denial is another due process violation.

Normally motions for reconsideration

> shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing.

Order 44 at 8.

As there was no "original hearing," no reason to present admissibility arguments for individual exhibits, and no other opportunity to respond to the objections, applying the normal limitation on motions to reconsider as a basis for denying reconsideration, would be a further due process violation.

Parties are now filing motions to reconsider in response to the dysfunctional and unconstitutional process imposed by the Hearing Officer on this proceeding. See e.g. DOCs-559, 560, 562, 563, 564, 565, 566, 567, 568, 569, 570.

Again, the time being spent by the parties on the exhibits litigation is time taken away from preparing the findings of fact and conclusions of law already required to be completed within a totally inadequate time frame.

The Hearing Officer signed Order 43 on April 19, 2017. Order 43 provided 5 business days for the filing of a motion for reconsideration. Order 43 at 3. As the Hearing Officer signed the Order on April 19, the motions for reconsideration were due on April 26.

Responses to motions for reconsideration are to be filed within 5 business days of the motion to reconsider addressed in the response. Id. The latest response would be due on May 3.

The Hearing Officer signed Order 44 on April 20, 2017. The Order provides 5 business days for the filing of a motion to reconsider. Order 44 at 8. As the Hearing Officer signed the Order on April 20, motions to reconsider would be due no later than April 27.

Responses to motions for reconsideration are to be filed within 5 business days of the motion to reconsider addressed in the response. Id. The latest response would be due on May 4.

This scheduling means that there will be no final determination on the admissibility of exhibits currently objected to until some time after May 4.

The deadline for filing findings of fact and conclusions of law is May 30. Order 43. Whether the record of exhibits will even be complete by that time is open to question.

The Hearing Officer scheduled a Minute Order on exhibits to be issued on March 23, 2017. Order 44 at 1. That order did not issue because the Hearing Officer found

> t**he volume, extent, and complexity of the exhibits, motions, and responses necessitated significantly more time than anticipated.**

Order 44 at 1. The Order issued on April 20. Order 44. The Hearing Officer thus took just almost thirty days to address only the question of the admissibility of exhibits given "the volume, extent, and complexity" of the record involved.

The failure of the Hearing Officer to comply with HAR §13-1-38(a) by waiting until the record was complete before scheduling findings of fact and conclusions of law created a situation in which litigation over the incomplete record is using up the time scheduled for findings and conclusions. In a worst case scenario, the rulings on the motions for reconsideration just on the exhibits issues could be pending after the time for preparing findings and conclusions based on a final record expired.

III. CONCLUSION

The intervention of the Board is needed to bring order out of the chaos

created by the Hearing Officer's decision to adopt a process that violates the applicable procedural rules and the constitutional protections of due process.

The actual and potential harms inflicted by this chaos require a stay be entered while the Board determines how this case is to proceed.

The Temple of Lono urges the Board to enter a stay until such time as all issues regarding the record are resolved, including the Temple's motion to dismiss pending before the Board, or the flaws in the proceeding are found to be without remedy.

This motion for a stay is made on an emergency basis because the clock is running out on the time available to prepare findings and conclusions, while the parties are compelled to spend time litigating which exhibits will be part of the "entire record" – exactly what HAR §13-1-38(a) was meant to prevent.

DATED: April 27, 2017

_____/s/_____
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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for The Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawai'i, TMK (3) 4-4-015:009	) Case No. BLNR-CC-16-002))) **CERTIFICATE OF SERVICE**))))

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **TEMPLE OF LONO EMERGENCY MOTION TO STAY PROCEEDING** was served on the following parties by email on April 27, 2017:

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Dated: April 27, 2017 _____/s/_____
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