UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Return Date: November 20, 2017

NEW JERSEY WORK ENVIRONMENT COUNCIL and LOCAL 877, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Plaintiffs, v. STATE EMERGENCY RESPONSE COMMISSION, Defendant, CITY OF LINDEN and its LOCAL EMERGENCY PLANNING COMMITTEE, RULE 19 Defendant.	:	Docket No. 2:17-CV-02916-WJM-MF <u>Civil Action</u> BRIEF IN SUPPORT OF THE STATE EMERGENCY RESPONSE COMMISSION'S MOTION TO DISMISS

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11000-11050, was enacted to address preparedness and planning for hazardous chemical storage at specific facilities, and to provide a mechanism for limited public access to emergency response plans. EPCRA required the Governor of each State to appoint a State Emergency Response Commission (SERC) within six months of its passage. 42 U.S.C. § 11001(a). The SERC was required to designate Emergency Planning Districts to prepare and implement emergency plans within nine months of EPCRA's passage. § 11001(b). The SERC was then required to appoint a Local Emergency Planning Committee (LEPC) for each District. § 11001(c). Each LEPC must provide public meetings, respond to public comments, and allow the public limited access to emergency response plans. §§ 11001(a), 11044(a). EPCRA requires the SERC to "supervise and coordinate the activities of" the LEPC. § 11001(a). In the event a Governor fails to appoint a SERC, EPCRA requires the Governor to operate as the SERC. Id.

In response to EPCRA, New Jersey Governor Thomas Kean issued Executive Order No. 161. Ex.[2] A; CM/ECF Doc No. 1, ¶ 8. The

[1] Because the procedural history and facts are intertwined, they are combined to avoid repetition and for the court's convenience.
[2] "Ex." refers to SERC's exhibits, enclosed with this motion.

Executive Order 1) created New Jersey's SERC, 2) constituted the SERC with representatives from eight State agencies, and 3) designated each municipality and county as an Emergency Planning District. Ex. A at 2047-2048. The Executive Order delegated the appointment of the LEPCs to the "mayor or chief executive officer of the municipality." Ex. A ¶ 4 (referencing N.J. Stat. Ann. App. A:9-41). The Executive Order also required all State agencies to "cooperate with the [SERC] and to furnish it with such information, personnel and assistance as necessary to accomplish the purpose of [EPCRA] and this Executive Order." Id. ¶ 7.

In about 2014, Plaintiff Work Environment Council contacted the SERC with allegations that various LEPCs failed to provide access to their emergency response plan. CM/ECF Doc No. 1, ¶¶ 30-31. In response, the SERC, through the State Office of Emergency Management, engaged in extensive outreach with LEPCs, including providing multiple training programs, to facilitate compliance with EPCRA. CM/ECF Doc No. 1, ¶ 32; CM/ECF Docs Nos. 1-2, 1-3.

Despite the outreach and training efforts of the SERC and State Office of Emergency Management throughout 2015 and 2016, Plaintiffs continued to allege that certain LEPCs failed to provide public access to their respective emergency response plans. CM/ECF Doc No. 1, ¶ 34. From October through December 2016, SERC members contacted ten municipalities identified by Plaintiffs to reiterate

EPCRA's requirements, discuss the trainings provided to municipalities over the prior two years, and the municipalities' efforts toward full compliance with EPCRA. The municipalities were given the materials used at the training sessions and an emergency response plan template. Id.; CM/ECF Doc No. 1-2; CM/ECF Doc No. 1-3.

On April 28, 2017, the Plaintiffs filed a Complaint against the SERC, seeking an Order that requires the SERC to redress the alleged failures of various LEPCs to provide access to their emergency response plan. CM/ECF Doc No. 1, ¶ 41(b). The SERC files this Motion to Dismiss the Complaint.

LEGAL ARGUMENT

THE STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) governs motions raising lack of jurisdiction or immunity from the suit. Nair v. Oakland County Community Mental Health Auth., 443 F.3d 469, 476 (6th Cir. 2006). Such motions are facial challenges to the complaint. Bennett v. Atlantic City, 288 F. Supp. 2d 675, 678 (D.N.J. 2003). Review of a facial challenge is similar to review of a Rule 12(b)(6) motion and requires the Court to accept the allegations in the complaint as true. Id.

Rule 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief may be granted. In general, on a motion for failure to state a claim, the complaint is construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "Dismissal under Rule 12(b)(6) for failure to state a claim is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). Rule 12(b)(6) authorizes a court to dismiss a claim on a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989).

POINT I

THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE SUIT IS BARRED BY THE ELEVENTH AMENDMENT.

Plaintiffs have improperly named the SERC as the Defendant. It is well established that a federal cause of action cannot be maintained against either a State or an agency of that State. Alabama v. Pugh, 438 U.S. 781, 782 (1978). The prohibition against naming a State agency as a party derives from the Eleventh Amendment of the United States Constitution. It provides: "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against

one of the United States citizens of any foreign state, . . ." U.S. Const. amend. XI.

The Eleventh Amendment is not jurisdictional. It is a bar to suit whatever the jurisdictional basis, whether based upon a federal question, or pendant or ancillary jurisdiction. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 121 (1984). The Amendment by its terms applies to "any suit in law or equity." U.S. Const., Amend. XI.

The State itself need not be named as a Defendant in order for Eleventh Amendment immunity to apply. Rather, sovereign immunity extends to "agencies and departments" of the State, Pennhurst, 465 U.S. at 100, where they are "arms of the State." Edelman v. Jordan, 415 U.S. 651, 663 (1974).

The Third Circuit has adopted a three-step balancing test to determine if an agency is an arm of the State for purposes of Eleventh Amendment immunity:

> (1) the funding factor: whether the state treasury is legally responsible for an adverse judgment entered against the alleged arm of the State; (2) the status under state law factor: whether the entity is treated as an arm of the State under state case law and statutes; and (3) the autonomy factor: whether, based largely on the structure of its internal governance, the entity retains significant autonomy from state control.

Maliandi v. Montclair State Univ., 845 F.3d 77, 83 (3d Cir. 2016). All three factors lean strongly in favor of demonstrating that the SERC is an arm of the State.

Executive Order No. 161 created the New Jersey SERC and constituted it with members from eight State agencies. Ex. A at 2047-2048. The Executive Order required all State agencies to "cooperate with the [SERC] and to furnish it with such information, personnel and assistance as necessary to accomplish the purpose of [EPCRA] and this Executive Order." Id. ¶ 7.

The Governor may issue an executive order under the Constitutional authority as head of the executive branch. Kenny v. Byrne, 365 A.2d 211, 215 (N.J. Super. Ct. App. Div. 1976), aff'd, 383 A.2d 428 (N.J. 1978). Under this authority, the Governor may issue an executive order for "the achievement of maximum efficiency and economy in the execution of State administrative activities." Id. The Governor may also issue an executive order under the authority of a statute, Worthington v. Fauver, 440 A.2d 1128, 1135 (N.J. 1982), or for ceremonial purposes, Opinion of the Justices, 332 A.2d 165, 167 (N.H. 1975).

Because Executive Order No. 161 was issued under the Governor's authority as head of the executive branch of the State, the SERC is part of the executive branch. Thus, the three Maliandi factors weight strongly in favor of the SERC being an arm of the

State. First, because the SERC is part of the executive branch, the state treasury would be legally responsible for an adverse judgment entered against the SERC. Second, under the Kenny case, the SERC is considered to be part of the executive branch. Third, the SERC's internal governance brings it within the State's control because the SERC's members are the principals from eight State agencies. Ex. A at 2047-2048. As such, the SERC is considered an arm of the State.

There are three qualified exceptions to Eleventh Amendment immunity. First, a state may waive the protection of the Amendment by consenting to the suit. Second, Congress may abrogate the States' immunity under Constitutional authority for the abrogation and clear statutory language. Third, a plaintiff may sue an individual State official where such official is in violation of federal law. None of these exceptions are applicable here.

A. The SERC Did Not Consent to this Lawsuit.

The Supreme Court held that "a State's express waiver of sovereign immunity be unequivocal." College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd., 527 U.S. 666, 680 (1999). "[T]here is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would 'find waiver only where stated by the most express language

or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Id. at 673 (citations omitted). The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." Id. at 675.

In this case, the SERC has not voluntarily appeared for this lawsuit or otherwise expressly waived immunity. The Rule 12(b)(1) motion is the appropriate mechanism to dismiss claims barred by the Eleventh Amendment, Nair, 443 F.3d at 476, and Plaintiffs' Complaint should be dismissed here.

B. EPCRA did Not Abrogate the States' Eleventh Amendment Immunity.

The second exception to the Eleventh Amendment bar is that Congress may abrogate the sovereign immunity of the States through statute. For a Congressional abrogation of state sovereign immunity to be valid, two conditions must be satisfied. First, Congress' abrogation must be pursuant to a provision of the Constitution that authorizes the abridgement of the States' Eleventh Amendment immunity. Seminole Tribe v. Florida, 517 U.S. 44, 59-66 (1996). Second, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985). Neither of these conditions are met here.

1. Because EPCRA was Enacted under the Commerce Clause, Congress Lacks the Power to Abrogate States' Eleventh Amendment Immunity.

In enacting EPCRA, Congress did not act pursuant to a Constitutional provision that would have authorized it to abrogate the States' Eleventh Amendment immunity. See Seminole Tribe, 417 U.S. at 59.

The Supreme Court held that Congress may abrogate Eleventh Amendment immunity under the Fourteenth Amendment. Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)). The Court has also suggested that Congress may abrogate state sovereign immunity under the Fifteenth Amendment. City of Rome v. United States, 446 U.S. 156, 179-80 (1980). However, Congress lacks such authority under the Commerce Clause. Seminole Tribe, 417 U.S. at 59-66.

Although Congress did not include an explicit statement regarding its authority to enact EPCRA, courts have construed Congress's authority to enact environmental statutes as emanating from the Commerce Clause. Rapanos v. United States, 547 U.S. 715 738-39 (2006) (Clean Water Act); New York v. United States, 505 U.S. 144, 160 (1992) (Low-Level Radioactive Waste Policy Amendments

Act of 1985); United States v. Delfasco, Inc., 409 B.R. 704, 707 (D. Del. 2009) ("environmental statutes and regulations such as RCRA are 'rooted in the commerce clause. . . .'"); In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 559 F. Supp. 2d 424, 428 n.14 (S.D.N.Y. May 7, 2008) (Toxic Substances Control Act); United States v. Domenic Lombardi Realty, Inc., 204 F. Supp. 2d 318, 329 (D.R.I. 2002) (Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)). Because Congress lacks the authority to abrogate States' Eleventh Amendment immunity under the Commerce Clause, the Plaintiffs' lawsuit against the SERC should be dismissed.

2. Congress Failed to Manifest Its Intention to Abrogate the SERC's Eleventh Amendment Immunity under EPCRA.

Even if EPCRA was enacted under Constitutional authority to abrogate Eleventh Amendment immunity, Congress failed to clearly manifest its intention to abrogate such immunity. The Supreme Court requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" Pennhurst, 465 U.S. at 99. "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When

Congress chooses to subject the States to federal jurisdiction, it must do so specifically." Atascadero, 473 U.S. at 246.

In Seminole Tribe, the Supreme Court found that Congress had manifested a clear intent to waive Eleventh Amendment immunity under the Indian Gaming Regulatory Act based on two factors. First, the Court relied on Section 2710(d)(7)(A)(i) of the Act, which vests jurisdiction in "the United States district courts . . . over any cause of action . . . ." 517 U.S. at 56-57. Second, the Court found that a defendant in such suit would clearly be a State, as demonstrated by the numerous references to States in the Act. Id. at 57.

Court decisions analyzing whether Congress intended to waive Eleventh Amendment immunity under the Fair Labor Standards Act (FLSA) are also instructive. The Supreme Court held in Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare that Congress did not clearly manifest its intent to waive States' Eleventh Amendment immunity because it did not clearly provide a federal court remedy. 411 U.S. 279, 282-85 (1973). Section 3(d) of the FLSA originally excluded any State or political subdivision of a State from the definition of "employer." See id. at 282. But in 1966, the definition of "employer" was amended to include those with "employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or

school . . . ." Id. Although the Court found that the literal meaning of the amendment did cover the State hospital in question, the Court held that the amendment did not clearly provide a federal court remedy with the following statutory language: "Action to recover such liability may be maintained in any court of competent jurisdiction . . . ." Id. at 285. The Court held that the statutory language was not equivocal enough to demonstrate Congress' intent to bring "the States to heel, in the sense of lifting their immunity from suit in a federal court . . . ." Id. at 283.

In response to the Employees decision, Congress amended the FLSA in 1974 to specify that an action under the FLSA "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b) (emphasis added). Courts have since held that the 1974 amendment manifested Congress' clear intent to waive States' immunity because the amendment clearly provided that 1) States are subject to the FLSA and 2) States are subject to an enforcement action in federal court. See, e.g., Hale v. Arizona, 993 F.2d 1387, 1391 (9th Cir. 1992) (en banc).

In this case, Congress failed to unequivocally state its intention to waive States' Eleventh Amendment immunity. Although subsection 11046(a) of EPCRA states that a State Governor or SERC may be named in a citizen suit, 42 U.S.C. § 11046(a)(1), EPCRA does

not provide a remedy in court against these State entities. Subsections 11046(b) and (c) of EPCRA provide:

> (b) Venue.
>
> > (1) Any action under subsection (a) against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.
> >
> > (2) Any action under subsection (a) against the Administrator[3] may be brought in the United States District Court for the District of Columbia.
>
> (c) Relief. The district court shall have jurisdiction in actions brought under subsection (a) against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in actions brought under subsection (a) against the Administrator to order the Administrator to perform the act or duty concerned.

42 U.S.C. § 11046 (emphasis added). Although these provisions provide a federal court remedy against certain chemical facilities and the Administrator of the U.S. Environmental Protection Agency, they do not provide a remedy against the SERC or a State.

Furthermore, EPCRA exempts governmental entities from any penalty liability. See 42 U.S.C. § 11045(a), (b), (d), (e) (subjecting potential penalty liability to private facilities that

[3] Pursuant to 42 U.S.C. § 11049, the term "Administrator" means the Administrator of the U.S. Environmental Protection Agency.

are subject to EPCRA based on the nature and quantities of chemicals that are used and stored at their facility); § 11045(c) (specifically exempting a "governmental entity" from penalty liability).

Because EPCRA does not provide a remedy in Federal Court against a SERC or State Governor, Congress failed to unequivocally manifest its intent to waive States' Eleventh Amendment immunity. The complaint should therefore be dismissed.

C. The Ex Parte Young Exception to Eleventh Amendment Immunity Does not Apply Here.

Under the third exception to Eleventh Amendment immunity, a suit may challenge the constitutionality of a State official's action. Pennhurst, 465 U.S. at 102 (citing Ex parte Young, 209 U.S. 123 (1908)). The idea behind this exception is that a suit against a state officer is not a suit against the State when the remedy sought is an injunction against a violation of federal law, for an officer is not acting on behalf of the State when he acts illegally. Injunctive relief is available under the Ex Parte Young exception only against State officers. Pennhurst, 465 U.S. at 79.

Because Plaintiffs in this case did not name any individual officers, the Ex Parte Young exception to Eleventh Amendment

immunity does not apply. Accordingly, the Plaintiffs' Complaint should be dismissed because it is barred by the Eleventh Amendment.

Point II

THE COMPLAINT SHOULD BE DISMISSED BECAUSE EPCRA DOES NOT PROVIDE FOR THIS ACTION OR THE REMEDY SOUGHT IN THE COMPLAINT.

In the alternative, the Complaint should be dismissed because Congress did not provide for the action pursued by the Plaintiffs or the remedy sought in the Complaint. Specifically, the Complaint seeks an Order requiring the SERC to take enforcement actions against Linden Township and other LEPCs that have not granted public access to their emergency response plans. EPCRA only allows a citizen suit against the SERC where the SERC fails "to provide a mechanism for public availability of information." 42 U.S.C. § 11046(a)(1)(C). However, as discussed above, EPCRA does not provide a remedy against the SERC in federal court. § 11046(c).

The Supreme Court held that private rights of action and private remedies to enforce federal law must be created by Congress. Alexander v. Sandoval, 532 U.S. 275, 286 (2001). "[N]ot all private rights of action are created equally; Congress may (and does) tailor rights of action to suit various purposes and goals." Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth., 382 F.3d 412, 421 (3d Cir. 2004).

In construing Section 504 of the Rehabilitation Act, the Third Circuit held that the act creates an implied right of action but to enforce personal rights that the statute creates and not systemic obligations. Id. at 431. In construing the Indian Gaming Regulatory Act, the Supreme Court held that the act's intricate enforcement procedures demonstrate Congressional intent to significantly limit the sanctions for a State's violation. Seminole Tribe, 517 U.S. at 74-75. As such, the Court held that the Plaintiffs could not maintain an action against a state official under Ex parte Young. Id.

EPCRA similarly limits the type of action that may be sought. As discussed above, EPCRA places certain mandates on each State Governor and the SERC. EPCRA requires the Governor of each State to appoint a SERC. 42 U.S.C. § 11001(a). The SERC is then required to designate Emergency Planning Districts "to facilitate preparation and implementation of emergency plans," § 11001(b), and to "appoint members of a Local Emergency Planning Committee for each emergency planning district," § 11001(c).

The balance of EPCRA's responsibilities concerning emergency response plans falls mainly on the LEPCs. For example, EPCRA provides: "Each Local Emergency Planning Committee shall complete preparation of an emergency plan in accordance with this section . . . ." § 11003(a). Each LEPC must review the emergency plan at

least once per year and submit a copy of the plan to the SERC for its review. § 11003(a), (e). Limited access to emergency response plans at designated locations during normal working hours is required so the public can review and comment on the plan. § 11044(a). Each LEPC must publish notice in a local newspaper of the emergency plan's availability and the location designated for public review. § 11044(b). The LEPC must also conduct public meetings to discuss the emergency plan, to hear public comments on the plan, and to respond to such comments. § 11001(c). However, EPCRA does not authorize the SERC to take any enforcement actions against the LEPCs. 42 U.S.C. §§ 11045, 11046.

EPCRA limits the type of suit that may be filed against the SERC to the instance where the SERC fails "to provide a mechanism for public availability of information in accordance with section 324(a) [42 U.S.C. § 11044(a)]." § 11046(a)(1)(C).

In this case, the Complaint does not allege that the SERC failed to provide a mechanism for public availability of information in accordance with 42 U.S.C. § 11044(a), nor does it seek a remedy related to such an allegation. In fact, the SERC has provided such a mechanism. On February 13, 1987, the Governor issued Executive Order No. 161, which created New Jersey's SERC. Ex. A; CM/ECF Doc No. 1, ¶ 15. The Executive Order also designated each township as an LEPC. Ex. A ¶ 4 (referencing N.J. Stat. Ann.

App. A:9-41); CM/ECF Doc No. 1, ¶ 17. Those LEPCs are charged with the responsibility of making the emergency response plans available in accordance with EPCRA.

Plaintiffs instead allege that certain LEPCs have failed to provide public access to their emergency response plan, such as the City of Linden, CM/ECF Doc No. 1, ¶ 34, and they seek an Order against the SERC requiring it to take enforcement action against Linden and other non-compliant LEPCs, CM/ECF Doc No. 1, ¶ 41(b). However, Congress has not provided such private rights of action to enforce EPCRA.[4]

Furthermore, EPCRA does not provide an implied private right of action or remedy to require the SERC to take enforcement action against the LEPCs. Courts may infer a private right of action where such a right is found in Congressional intent to create such a right. Thompson v. Thompson, 484 U.S. 174, 179 (1988). Courts consider the following four factors in determining whether a private right of action exists.

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a

[4] Even if EPCRA had provided the SERC with enforcement authority against Local Emergency Planning Committees, the Complaint should still be dismissed because an agency's decision to refrain from taking enforcement action is not subject to judicial review. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

> remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [Fourth,] is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted) (quoted in Three Rivers, 382 F.3d at 421).

Plaintiffs fail to meet any of the four factors. First, EPCRA's main purpose was not to benefit any one class of individuals by giving them additional federal rights. Instead, EPCRA is a public safety law. It is directed at States, local emergency management entities, and private chemical facilities for the purpose of developing appropriate emergency response plans for emergencies at chemical facilities.

Second, Congress did not intend to create the cause of action or the remedy sought in the Complaint. Although the LEPCs are required to develop the emergency response plan and to make them available to the public, EPCRA does not provide the SERC with the authority to take enforcement action against the LEPCs. 42 U.S.C. § 11046. The House debates reflect this lack of authority: "None of these provisions provide for suits against local emergency planning committees." Staff of Senate Comm. on Env't and Pub. Works, 101st Cong., A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499) 5340 (Comm. Print

Sept. 1990) (statement of Rep. Swift) (Ex. B). Furthermore, EPCRA does not provide relief against the SERC in district court. 42 U.S.C. § 11046(c).

Third, the Complaint's cause of action and relief sought is not consistent with the underlying purposes of EPCRA's legislative scheme. Even if Congress provided the SERC with enforcement authority against the LEPCs, the SERC's decision on whether to take such enforcement action would not be reviewable by the courts. See Heckler, 470 U.S. at 831.

Finally, emergency response is primarily the responsibility and concern of State and local governments. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 (1985) (Powell, J., dissenting). Thus, it would be inappropriate to infer a cause of action based solely on federal law.

Therefore, the Complaint should be dismissed because EPCRA does not provide the cause of action or remedy sought by the Plaintiffs.

CONCLUSION

For these reasons, the Court should grant the SERC's Motion to Dismiss.

Respectfully submitted,

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Dated: October 19, 2017