**IN THE HIGH COURT OF JUSTICE** **CO/3256/2018**
**ADMINISTRATIVE COURT**
**PLANNING COURT**

**BETWEEN:**

**R (o.a.o. PAUL JOHN ANDREWS)**

**Claimant**

**-and-**

**(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**
**(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT**

**Defendants**

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**SUMMARY GROUNDS OF RESISTANCE ON BEHALF OF THE DEFENDANTS**

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References:

- References to the claim bundle are in the format [tab number/page number].
- References to paragraphs in the Claimant's Amended Statement of Facts and Grounds dated 6 September 2018 are in the format "ASFG[xx]".

## Introduction

1. The Claimant applies for permission to proceed with a claim for judicial review of the Defendants' decision to issue a written ministerial statement on fracking ("**the 2018 WMS**" [3/13]) on 17 May 2018.

2. The Claimant advances three grounds of challenge, namely:

   2.1. An alleged failure to undertake strategic environmental assessment ("**SEA**") of the 2018 WMS;

   2.2. An alleged failure to consult in respect of the 2018 WMS; and

   2.3. Alleged irrationality and lack of clarity in the policy in the 2018 WMS.

3. The Defendants contest the claim in its entirety and submit that permission should be refused because none of the grounds of challenge advanced by the Claimant is arguable.

4. Each of the three grounds of challenge is addressed individually below. At the outset, however, the Defendants observe that all three grounds of challenge are premised upon (i) a failure to acknowledge what is actually stated in the 2018 WMS and (ii) an inaccurate understanding of what is (and is not) required by the 2018 WMS.

5. The passage in the 2018 WMS to which the grounds of challenge relate is worded as follows:

"*We expect Mineral Planning Authorities to recognise the fact that Parliament has set out in statute the relevant definitions of hydrocarbon, natural gas and associated hydraulic fracturing. In addition, these matters are described in Planning Practice Guidance, which Plans must have due regard to. Consistent with this Planning Practice Guidance, policies should avoid undue sterilisation of mineral resources (including shale gas)*".

6. As amended by the Infrastructure Act 2015, the Petroleum Act 1998 ("**the PA 1998**") provides (in so far as is relevant) as follows:

*"4A Onshore hydraulic fracturing: safeguards*
*(1) The OGA must not issue a well consent that is required by an onshore licence for England or Wales unless the well consent imposes—*
*(a) a condition which prohibits associated hydraulic fracturing from taking place in land at a depth of less than 1000 metres; and*
*(b) a condition which prohibits associated hydraulic fracturing from taking place in land at a depth of 1000 metres or more unless the licensee has the Secretary of State's consent for it to take place (a "hydraulic fracturing consent").*

*4B Section 4A: supplementary provision*
*(1) "Associated hydraulic fracturing" means hydraulic fracturing of shale or strata encased in shale which—*
*(a) is carried out in connection with the use of the relevant well to search or bore for or get petroleum, and*
*(b) involves, or is expected to involve, the injection of— (i) more than 1,000 cubic metres of fluid at each stage, or expected stage, of the hydraulic fracturing, or (ii) more than 10,000 cubic metres of fluid in total".*

7. MHCLG's *Planning Practice Guidance: Minerals* ("**PPGM**") explains (in Annex A, at para. 129 [9/93]) that "[h]*ydraulic fracturing is the process of opening and/or extending existing narrow fractures or creating new ones (fractures are typically hairline in width) in gas or oil-bearing rock, which allows gas or oil to flow into wellbores to be captured*".[1]

8. It is apparent that the legislation and guidance set out above serve different purposes:

[1] Para. 129, reference ID 27-129-20140306, last revised 6 March 2014.

8.1. The PA 1998 does not define "*hydraulic fracturing*". Rather, s. 4B of the PA 1998 defines the circumstances in which hydraulic fracturing will be "*associated hydraulic fracturing*" for the purposes of s. 4A of the PA 1998 (such that the Oil and Gas Authority ("**OGA**") may only issue a well consent if the latter imposes conditions that (in effect) prohibit associated hydraulic fracturing from taking place without a hydraulic fracturing consent from the Secretary of State).

8.2. In contrast, the PPGM provides a description of the hydraulic fracturing process, to assist mineral planning authorities ("**MPAs**") in understanding how the process works. That this is the purpose of this part of the PPGM is particularly apparent from (i) para. 130 of Annex A, which follows on from para. 129 (above) by providing a more detailed explanation of how the hydraulic fracturing process works; and (ii) Figure 1 at para. 131 of Annex A, which is an illustration of shale gas extraction taken from the British Geological Survey.

9. Importantly, the 2018 WMS does not require MPAs to apply the definition of "*associated hydraulic fracturing*" provided in the PA 1998. The 2018 WMS merely sets out an expectation that MPAs will "*recognise*" that Parliament has provided statutory definitions. Similarly, the 2018 WMS simply explains that mineral plans must have due regard to the PPGM and that the latter contains relevant descriptions.

10. If the Defendants had wished to impose an obligation upon MPAs to apply the definition of "*associated hydraulic fracturing*" that is set out in the PA 1998 and/or the description of "*hydraulic fracturing*" that is given in the PPGM, the 2018 WMS could easily have been worded to that effect. It is not so worded.

11. The Claimant is, therefore, wrong to assert that the 2018 WMS effects "*a material change in planning policy*". The 2018 WMS simply reminds MPAs of the existence of the PA 1998 statutory definition and of the description given in the PPGM.

12. When the (limited) effect of the relevant passage of the 2018 WMS is properly acknowledged, it is apparent that each of the three grounds of challenge is unarguable. The Defendants respond to the specific points raised as follows.

**Ground 1: Alleged failure to undertake SEA of the 2018 WMS**

13. The first ground of challenge contends that SEA of the 2018 WMS was required pursuant to Directive 2001/42/EC ("**the Directive**").

14. That contention is without foundation. The WMS 2018 did not require SEA for three reasons: (i) it is not a "*plan*" or "*programme*"; (ii) it was not "*required by legislative, regulatory or administrative provisions*"; and (iii) it does not "*set the framework for future development consent of projects*".

The provisions of the Directive

15. Art. 3(1) provides that an environmental assessment shall be carried out for "*plans and programmes*" referred to in Art. 3(2)-(4) that are likely to have significant environmental effects. Art. 2(a) defines "*plans and programmes*" as follows:

"*...plans and programmes, including those co-financed by the European Community, as well as any modifications to them:*

- *which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and*
- *which are required by legislative, regulatory or administrative provisions;*".

16. Art. 3(2)-(4) provides as follows:

*"2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,*
*(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or*
*(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.*

*3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.*

*4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects"* (emphasis added).

17. Therefore, plans and programmes that are not "*required by legislative, regulatory or administrative provisions*" fall outside the Art. 2(a) definition of "*plans and programmes*" and do not require SEA under the Directive. Similarly, plans and programmes that do not "*set the framework for future development consent of projects*" do not require SEA, unless they have been

determined to require an assessment pursuant to Art. 6 or Art. 7 of Directive 92/43/EEC (the Habitats Directive). The 2018 WMS does not fall within the latter category.

The 2018 WMS is not a plan or programme

18. The 2018 WMS is not a plan or programme. It is a restatement of policy. The Directive does not require SEA of policies: see (i) the European Commission's report *on the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC)*[2] at paras. 4.3 and 7 and (ii) European Commission guidance *Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment* at footnote 4.

The 2018 WMS is not required by legislative, regulatory or administrative provisions

19. In Case C-567/10 ***Inter-Environnement Bruxelles*** ("***Inter-Environnement No. 1***") [2012] 2 CMLR 30 the Fourth Chamber of the Court of Justice of the European Union ("**CJEU**") held as follows at [31]:

"*...plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as "required" within the meaning, and for the application, of Directive 2003/42...*".

20. The adoption of the 2018 WMS was not regulated by any national legislative or regulatory provision. It follows that the 2018 WMS is not "*required by*" legislative, regulatory or administrative provisions for the purpose of the Directive.

The 2018 WMS does not set the framework for future development consent of projects

21. In Joined Cases C-105/09 and C-110/09 ***Terre Wallonne*** [2010] ECR I-5611 the CJEU (Fourth Chamber) concluded that the programme in question was "*in principle a plan or programme covered by Article 3(2)(a) of Directive 2001/42 since it constitutes a 'plan' or 'programme' within the meaning of Article 2(a) of the latter directive and contains measures compliance with which is a requirement for issue of the consent that may be granted for carrying out projects listed in Annexes I and II to Directive 85/337*" ([55]).

22. In ***Inter-Environnement No. 1*** the Fourth Chamber (at [30]) referred to "*the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and*

[2] COM/2009/0469 final.

*normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures*" (emphasis added).

23. That reasoning was subsequently adopted by the Grand Chamber in Case C-43/10 ***Nomarchiaki Aftodioikisi Aitoloakarnanias*** [2013] Env LR 453, the Grand Chamber concluding that "[i]*t is not evident that the project concerned constitutes a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny (see, to that effect, Case C-567/10* ***Inter-Environment Bruxelles and Others*** *[2012] ECR, paragraph 30)*".

24. More recently, in Case C-290/15 ***D'Oultremont*** the CJEU (Second Chamber) observed that "*it should be noted that the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (see, to that effect,* [***Nomarchiaki***])". The CJEU referred to ***D'Oultremont*** in Case C-671/16 ***Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale*** ("***Inter-Environnement No. 2***") at [56].

25. In ***R (Buckinghamshire County Council) v Secretary of State for Transport*** [2014] 1 WLR 324 ("***HS2***") Lord Carnwath JSC observed that the specific purpose of the SEA Directive was to prevent major effects on the environment being predetermined by earlier planning measures before the EIA stage was reached ([35]). The concept of a plan / programme that "*set the framework*" was "*reasonably clear*": one was looking for "*something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects*" ([36]). For a plan / programme to "*set the framework*", it had to constrain the decision-making process of the responsible authority: constrain its subsequent consideration, and prevent appropriate account from being taken of all the environmental effects that might otherwise be relevant ([38] and [40]).

26. Lord Sumption JSC reasoned similarly:

*"[122] The object is to deal with cases where the environmental impact assessment prepared under the EIA Directive at the stage when development consent is granted is wholly or partly pre-empted,*

*because some relevant factor is governed by a framework of planning policy adopted at an earlier stage.*

*[123] None of this means that the only policy framework which counts is one which is determinative of the application for development consent, or of some question relevant to the application for development consent. What it means is that the policy framework must operate as a constraint on the discretion of the authority charged with making the subsequent decision about development consent. It must at least limit the range of discretionary factors which can be taken into account in making that decision, or affect the weight to be attached to them".*

27. Applying the case-law summarised above, the 2018 WMS does not "*set the framework*" for future development consent of projects. Whilst it is a material consideration in plan-making and decision-taking, compliance with its provisions is not a requirement that must be met if planning permission / development consent is to be granted at the "project" stage (***Terre Wallonne***). The 2018 WMS does not "*establis*[h] […] *a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment*" (***Inter-Environnement No. 1, Nomarchiaki, D'Oultremont, Inter-Environnement No. 2***).

28. The 2018 WMS is entirely non-directional. As explained above, it requires only that MPAs "*recognise*" the relevant statutory definitions and that mineral plans "*have due regard*" to the PPGM. It does not require MPAs to apply any particular definition or description.

29. Thus, the MPA's discretion in exercising its plan-making function is not "*constrained*" or "*limited*" by the 2018 MWS (***HS2***, *per* Lord Carnwath and Lord Sumption JJSC). The 2018 WMS does not affect the weight to be attached to any particular definition / description (***HS2***, *per* Lord Sumption JSC).

30. For all of the above reasons, it is unarguable that the 2018 WMS "*amounts to a material change in planning policy*" that will *"set the framework for future development consent of projects*".

31. The 2018 WMS did not require SEA.

**Ground 2: Alleged failure to consult in respect of the 2018 WMS**

32. The following three allegations are made under the second ground of challenge:[3]

    32.1. Art. 6 of the Directive required the Defendants to consult on the 2018 WMS;

[3] ASFG[52]-[55].

32.2. The 2018 WMS was "*a change in planning policy that is 'likely to have significant effects on the environment*'": as such, "*fairness and compliance with both the spirit and the letter of the Aarhus Convention*" required that consultation be undertaken; and

32.3. The Defendants have failed to explain why they considered that it was appropriate to consult on "*other proposed changes to planning policy on shale gas developments*" but not on "*the advice given to MPA*[s] *on the application of the statutory definition*".

33. As to the first limb, for the reasons given above the 2018 WMS did not require SEA and Art. 6 of the Directive was not engaged.

34. The second limb of Ground 2 is similarly premised on the erroneous assertion that the 2018 WMS amounts to a material change in planning policy. As explained above, it does not. The relevant passage simply "signposts" for the benefit of MPAs (i) existing statutory definitions and (ii) relevant descriptions contained in guidance. Neither the letter nor the spirit of the Aarhus Convention requires consultation on a document that is so limited in its effect.

35. As to the third limb of Ground 2, it is because the effect of the 2018 WMS is so limited – that is, it is a restatement of policy rather than an introduction of new policy - that the Defendants (correctly) did not consider that consultation was necessary.

36. There is nothing in the second ground of challenge.

**Ground 3: Alleged irrationality and lack of clarity in the policy in the 2018 WMS**

37. The argument that the relevant passage of the 2018 WMS is irrational is entirely without merit. It is plainly rational for the Defendants to require MPAs simply to "*recognise*" that the PA 1998 statutory definition exists and to remind them that there are also relevant descriptions in the PPGM, to which mineral plans must have due regard.

38. The third ground of challenge also complains of a lack of clarity in the 2018 WMS. It is not accepted that there is any lack of clarity in the document. It is quite clear both (i) which definitions and descriptions are being referred to and (ii) what MPAs are required to do (i.e. recognise the existence of the PA 1998 statutory definition and have due regard to the PPGM).

39. Far from occasioning uncertainty, the relevant passage of the 2018 WMS provides clarity by confirming the continuation of the existing legal position. The third ground of challenge is unarguable.

**The Claimant's application for interim relief**

40. By application notice dated 7 September 2018 the Claimant seeks an order that the 2018 WMS be stayed pending the outcome of these proceedings. The Defendants resist the Claimant's application for interim relief.

Expert evidence

41. It is first necessary to address the witness statement of Katie Atkinson dated 6 September 2018, which is relied upon in support of the application. Ms Anderson acknowledges that she has "*been instructed by the Claimant to provide expert evidence on the impact that the adoption of the Infrastructure Act 2015* […] *statutory definition of 'associated hydraulic fracturing' would have on the plan making and decision-making process*" (emphasis added).

42. The use of expert evidence in judicial review proceedings, as in all civil proceedings, in the High Court is governed by CPR Part 35: ***R (The Law Society) v The Lord Chancellor*** [2018] EWHC 2094 (Admin) at [36]. The Claimant has failed to comply with the requirements of CPR Part 35, in particular r. 35.4(1), which states that no party may call an expert or put in evidence an expert's report without the court's permission. The Claimant has not made any application for such permission.

43. The Claimant's reliance on Ms Atkinson's evidence is also contrary to CPR r. 35.1, which provides that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. Ms Atkinson's evidence does not meet that description:

    43.1. Expert evidence should not, in general, be admitted in judicial review proceedings: see ***R (Lynch) v General Dental Council*** [2004] 1 All ER 159 *per* Collins J at [22], where he observed that "*fresh evidence involving expert evidence should in general not be admitted unless it falls within the* ***Powis*** *guidelines*". That is a reference to ***R v Secretary of State for the Environment, ex parte Powis*** [1981] 1 WLR 584, *per* Dunn LJ at 595G:

    "*What are the principles on which fresh evidence should be admitted on judicial review? They are (1) that the court can receive evidence to show what material was before the minister or inferior tribunal* […]*; (2) where the jurisdiction of the minister or inferior tribunal*

*depends on a question of fact or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error* […]*; and (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct are bias by the decision making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged* […]."

43.2. Ms Atkinson's evidence does not fall within the ***Powis*** guidelines.

43.3. In ***The Law Society*** (above) the Divisional Court - before discussing ***Powis*** and ***Lynch*** - held (at [36]) that:

*"…It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken – let alone any expert evidence".*[4]

43.4. In particular, it is not permissible to adduce, either by way of expert evidence or at all, evidence that purports to answer the question that it is for the court to answer: ***R v Haringey BC, ex parte Norton*** (1998) 1 CCLR 168 *per* Roger Henderson QC (sitting as a Deputy High Court Judge) at 180E-G. In setting out her view of the effect of the 2018 WMS,[5] Ms Atkinson's evidence plainly trespasses into that territory.

44. It follows that Ms Atkinson's witness statement is inadmissible.

<u>The application for a stay of the 2018 WMS</u>

45. Turning to the substance of the application for interim relief, the legal principles that govern such an application are conveniently summarised as follows in the judgment of Cranston J in ***Lisle-Mainwaring v Royal Borough of Kensington and Chelsea*** [2015] EWHC 1814 (Admin) at [3]:

*"The principles for granting interim relief are common to both sides. They turn on the principles contained in the well-known decision of* ***American Cyanamid v Ethicon Ltd*** *[1975] AC 396, but modified as appropriate to a public law challenge. In other words, the first question is whether there is a serious question to be tried or a real prospect of success. […] The* ***American Cyanamid*** *test must be modified, as I have said, in the light of the public interest which this type of case*

[4] See also ***R (Naik) v SSHD*** [2011] EWCA Civ 1546 *per* Carnwath LJ (as he then was) at [63] and ***R (Dŵr Cymru Cyfyngedig) v Environment Agency for Wales*** [2003] EWHC 336 (Admin) *per* Harrison J at [58].
[5] See e.g. paras. 12 to 16 of her witness statement.

*involves. […] In* ***R (on the application of Medical Justice) v Secretary of State for the Home Department*** *[2010] EWHC 1425 (Admin) at paragraphs 12 and 13, I put the matter thus:*

> *"12. The more important issue in considering interim relief in this issue is where the balance of convenience lies. In judicial review, this consideration varies from its application in private law, because generally speaking damages will not be payable in the event of an unlawful administrative act, nor will a public authority suffer financial loss from being prevented from implementing its policy. The public interest is strong in permitting a public authority to continue to apply its policy when ex hypothesi it is acting in the public interest. That wider public interest cannot be measured simply in terms of the financial or individual consequences to the parties, a point made by Browne LJ in his judgment in* ***Smith v Inner London Education Authority*** *[1978] 1 All ER 411 , at 422 H…"".*

46. For all the reasons set out above, these proceedings do not have a real prospect of success. Even if the contrary conclusion is reached, the public interest against staying the 2018 WMS is strong: see the passage from ***Medical Justice***, above.

47. The interim relief sought is a stay of the 2018 WMS. Yet the Claimant himself apparently does not consider a stay to be necessary: the focus of paras. 7 to 10 of the second witness statement of Ricardo Gama on behalf of the Claimant is a complaint that the Defendants have failed to clarify how the 2018 WMS is to be interpreted (and a suggestion that the Defendants provide such clarification). As explained above, far from occasioning uncertainty the relevant passage of the 2018 WMS provides clarity by confirming the continuation of the existing legal position. No further clarification from the Defendants is necessary.

48. Moreover (and importantly in respect of the application for interim relief) since the effect of the 2018 WMS is to confirm the continuation of the existing legal position, staying the 2018 WMS would not address the Claimant's complaint of an absence of clarity. It would render the position less certain, by suspending the effect of a document the purpose of which is to affirm long standing principles of national planning policy (and the role that those principles should play in plan making and decision taking). The Government has both recognised the national need to explore and develop shale gas and oil resources and provided policy support for such exploration and development since the 2015 WMS.[6] That suspending the effect of the 2018 WMS would render the position less certain increases the public interest in allowing the 2018 WMS to continue to apply. The loss of certainty that would result weighs in the balance of convenience against the granting of the interim relief sought.

[6] Shale Gas and Oil Policy: Written Statement - HCWS202 made on 16 September 2015.

49. Mr Gama also refers at para. 9 of his second witness statement to "*a significant risk that planning decisions will be made on the basis of the 2018 WMS before the proceedings are determined*". However, as Cranston J explained in ***Lisle-Mainwaring*** (at [28]), "*there is the basic point that in terms of individual planning applications, applicants always face the planning policies which operate at the time the application is made. In other words, there is no unfairness to persons making applications*".

50. The balance of convenience here is against granting interim relief and the Court is respectfully requested to refuse the Claimant's application for the same.

**Conclusion**

51. For all of the above reasons, the Defendants respectfully request that the Court:

    (1) Refuse permission; and

    (2) Order that the Claimant pay the Defendants' costs in the amount of £3,947.00 as shown in the attached schedule (see ***R (o.a.o. Mount Cook Land Ltd) v Westminster CC*** [2004] 2 P&CR 22 at [76]).

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28 September 2018

**CO/3256/2018**

**IN THE HIGH COURT OF JUSTICE**
**ADMINISTRATIVE COURT**
**PLANNING COURT**

**BETWEEN:**

**R (o.a.o. PAUL JOHN ANDREWS)**
**Claimant**

**-and-**

**(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**
**(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT**
**Defendants**

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**SUMMARY GROUNDS OF RESISTANCE**
**ON BEHALF OF THE DEFENDANTS**

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