IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL CONWAY, in his capacity as Liquidator of COLORADO HEALTH INSURANCE COOPERATIVE, INC.,	)	
	)	No. 18-1623C
Liquidator,	)	
v.	)	Judge Nancy B. Firestone
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

<u>UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS</u>

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INTROUCTION

In our Motion to Dismiss ("MTD"), Dkt. 10, we demonstrated that the Complaint should be dismissed in its entirety because it fails to state any claims upon which relief can be granted, and this Court lacks jurisdiction over the state law claim (Count II) of Plaintiff Michael Conway, in his capacity as liquidator of Colorado Health Insurance Cooperative, Inc.'s ("CHIC") estate (the "Liquidator"). We explained that the United States Department of Health and Human Services ("HHS") paid CHIC $24 million for its 2015 participation in the Patient Protection and Affordable Care Act ("ACA") reinsurance program by offsetting that $24 million against debts owed by CHIC to HHS under other ACA programs, including risk adjustment. In his opposition ("Opp."), Dkt. 11, the Liquidator *does not* contest this point. The Liquidator also does not, and cannot, contest that offset is a recognized form of payment and HHS's offset of the 2015 reinsurance payment was authorized by federal law and necessary for HHS's administration of the ACA.[1]

In our motion, we also demonstrated that the Liquidator's contention that Colorado law prohibited HHS's offset, while not a claim permitted under the Tucker Act, is also not correct. Conceding Count II – titled "Improper Setoff in Violation of Colorado Law" – as pled is subject to dismissal, the Liquidator suggests this Court nonetheless exercise jurisdiction over Count II because the government may assert a "right to offset" defense to the claim to payment pled at

[1] The Liquidator incorrectly asserts that "taxpayer" funds are not at issue here. Opp. at 2. The Liquidator demands that this Court enter judgment in favor of the Liquidator for $24 million, which would require payment of that amount out of the Judgment Fund. 31 U.S.C. § 1304. The judgment fund is a permanent, indefinite appropriation that is taxpayer-funded.

Count I. This is not the law.[2] Opp. at 30. The Liquidator cannot bootstrap an independent challenge to HHS's use of offset to a state law-based claim over which this Court lacks jurisdiction. Count II fails at the jurisdictional threshold.

As to Count I seeking payment under the reinsurance statute, the sole question is whether HHS paid CHIC its statutory 2015 reinsurance payment. The Liquidator does not dispute that payment was made by HHS setting off the amount owed to CHIC against amounts owed by CHIC under other ACA programs.[3] Compl. ¶ 53. The Liquidator's failure to challenge that point (which is indisputably true) should end this Court's inquiry – HHS complied with federal law, which authorized payment by offset, and paid CHIC its 2015 reinsurance payment. Thus, Count I (and, thus, the Complaint entirely) fails as a matter of law.

I. HHS Paid the 2015 Reinsurance Amount Owed to CHIC by Offset

In our motion, we explained that HHS paid the 2015 reinsurance amount owed to CHIC by offset and demonstrated that the right of the United States to use offset to collect debts is firmly established. MTD at 13-14; *see, e.g.*, *Brazos Elec. Power Co-op., Inc. v. United States*, 144 F.3d 784, 787-88 (Fed. Cir. 1998) ("[c]ancellation of debt owed to the federal government . . . is just as

[2] The Liquidator apparently asserts this Court's jurisdiction [over Count II] pursuant to 28 U.S.C. § 2508. Opp. at 1. But, the United States has not plead or counterclaimed against the Liquidator asserting the right to setoff and it need not do so. Rather, the United States asserts that CHIC was paid by setoff, rendering the Liquidator unable to state a claim for relief under 42 U.S.C. § 18061. "[Section 2508] necessarily presupposes the assertion by a plaintiff of a claim as to which the Court of Claims has jurisdiction, since the attempted assertion in this court by a claimant of a claim outside the jurisdiction of the court would, in effect, be a void act." *Mulholland v. United States*, 361 F.2d 237, 245 (Ct. Cl. 1966).

[3] The Liquidator's opposition does not assert that CHIC did not owe the money to HHS for other ACA programs against which HHS offset the reinsurance payment, or that HHS's offset was for an incorrect amount. Similarly, the Liquidator does not claim that HHS improperly applied 42 U.S.C. § 18061, the statute establishing the reinsurance program, or otherwise miscalculated the 2015 reinsurance payment amount or any other ACA-related charge.

much a form of monetary damages for purposes of the Tucker Act as the direct payment by the federal government of conventional money damages"). The Liquidator's opposition does not, and cannot, dispute this long-established point of blackletter law and its application in this Court. And, as noted, the Liquidator does not challenge that HHS paid the 2015 reinsurance amount by offset.

II. HHS's Offset Right Preempts Allegedly Conflicting Colorado Law

As we explained in our motion, federal law governs HHS's use of offset and preempts any conflicting Colorado law. We further explained that the Supreme Court "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs," like the ACA. *See United States v. Kimbell Foods, Inc*., 440 U.S. 715, 726 (1979). We demonstrated that HHS's Netting Regulation, 45 C.F.R. § 156.1215, promulgated under the ACA, which unquestionably authorizes HHS's offset here by permitting HHS to "net payments owed" to CHIC for the reinsurance program against "amounts due to" HHS for the risk adjustment program, preempts Colorado law.

In his opposition, the Liquidator apparently takes the incorrect position that the ACA must have a statutory provision specifically addressing offset in order to preempt Colorado law. Opp. at 6 (the ACA "contains no provision authorizing HHS to use offset to pay debt where doing so would be inconsistent with state law."); at 7 ("The Government's argument fails . . . because nowhere in its opposition brief does it identify any provision of the ACA that conflicts with the Colorado liquidation offset statute"); *see id.* at 16. But the Supremacy Clause applies broadly to federal law, and is not limited to federal statutes. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de La Cuesta*, 458 U.S. 141, 153 (1982); *see also Schoolcraft Memorial Hosp. v. Michigan Dept. of Community Health*, 570 F. Supp. 2d 949, 958 (W.D. Mich. 2008) ("The Supremacy Clause applies to federal

agency regulations . . . Preemption is not limited to acts of Congress. Federal regulation may also preempt state law.").

The Netting Regulation plainly preempts any state law that would purport to prohibit HHS from offsetting debts and credits from the ACA's premium stabilization programs – reinsurance, risk adjustment and risk corridors (the "3Rs") – and the ACA's Federal Consumer Subsidy programs.[4] 45 C.F.R. § 156.1215. "Preemption can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005) (citing *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 31 (1996); *de la Cuesta*, 458 U.S. at 153; *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003)). Here, each of these three types of preemption apply. First, the ACA has an express preemption clause. 42 U.S.C. § 18041(d). Second, the ACA legislates comprehensively in the field of health insurance. The third type of preemption is "conflict preemption" – "which can arise where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wachovia Bank*, 414 F.3d at 313-14 (quoting *de la Cuesta*, 458 U.S. at 153). The full purpose and objective of Congress, by the terms of the ACA, is for HHS to administer and execute the 3Rs. To the extent Colorado law frustrates that purpose

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[4] The Liquidator attaches significance to the fact that the Netting Regulation does not use the word "offset." Opp. at 13. In considering whether Colo. Rev. Stat. § 10-3-529 prohibits (through reverse preemption) HHS from setting off funds consistent with the Netting Regulation, the question for the Court is what the Netting Regulation actually permits, not semantics. Moreover, the Liquidator's contention that the Netting Regulation does not "create any *substantive* legal rules for offset," Opp. at 2, is both incorrect and irrelevant. In the Netting Regulation, HHS, consistent with its delegated authority, establishes a substantive right to offset ACA-program funds derived from Congress's statutory direction to HHS to administer the ACA, including the 3Rs and the Federal Consumer Subsidy programs.

(and it would if it purports to prohibit offset that the Netting Regulation specifically permits), the Netting Regulation preempts Colo. Rev. Stat. § 10-3-529.

Finally, "the Supreme Court has made it clear that a 'pre-emptive regulation's force does not depend on express congressional authorization to displace state law' and that a 'narrow focus' on Congress's intent to supercede state law is 'misdirected.'" *Wachovia Bank*, 414 F.3d at 314 (quoting *de la Cuesta*, 458 U.S. at 154). "The proper focus is on whether the agency effecting preemption 'has exceeded [its] statutory authority or acted arbitrarily.'" *Id.* The Liquidator does not, and cannot, assert that the Netting Regulation, promulgated in order to execute Congress's ACA statutory mandate, is inconsistent with or outside the authority of the ACA. Each of the 3R statutes obligates HHS to establish and execute a program. 42 U.S.C. §§ 18061-63. The Netting Regulation is one of many regulations by which HHS has implemented Congress's statutory objectives. To the extent state law contradicts the Netting Regulation, the Netting Regulation preempts.[5]

III. The Affordable Care Act Is Not Reverse-Preempted by Colorado Law

Despite the Liquidator's retreat in his opposition, the thrust of the Liquidator's claim is that HHS's offset was reverse preempted by Colo. Rev. Stat. § 10-3-529, which (allegedly) prohibited HHS's offset. That contention, at bottom, asserts that HHS violated Colorado state law, a claim over which this Court lacks jurisdiction. However, even if the Court entertains the Liquidator's state law arguments (and assumes that Colorado law prohibits offset), those

[5] The Liquidator appears to argue that unless the Netting Regulation or some provision of the ACA specifically states that HHS may offset "after an insurer enters liquidation," then Colorado state law controls. *See* Opp. at 15. But preemption does not require such specificity. If the Netting Regulation permits HHS to offset ACA program funds, then it preempts Colorado law, whether that law relates to insurance liquidation or any other circumstance.

arguments fail. Reverse-preemption under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), does not apply here because the ACA is a nationwide federal program that specifically regulates the business of insurance.[6]

After ignoring the Supreme Court's discussion of McCarran-Ferguson in *Barnett Bank* in its motion for summary judgment, a case we relied upon in our motion to dismiss, MTD at 17-19, the Liquidator now attempts to find support in the case in his opposition. Opp. at 5-6, 17. But the reasoning of *Barnett Bank* applied here unquestionably demonstrates that HHS's offset was proper. In *Barnett Bank*, the Supreme Court examined whether "the Federal Statute . . . 'specifically relates to the business of insurance.'" 517 U.S. at 38. Here, the Liquidator concedes the obvious: the ACA specifically relates to the business of insurance. Opp. at 7.

With that argument unquestionably lost, the Liquidator misdirects and, without any supporting legal authority, apparently asks this Court to analyze reverse preemption by artificially considering each ACA provision individually (and unrelated to each other). *See* Opp. at 7. But that is not how the ACA was structured and that is not how courts have described it. "The [ACA] adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015); s*ee Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1314 (Fed. Cir. 2018) ("The ACA established three programs designed to mitigate that risk and discourage insurers from setting higher premiums to offset that risk: reinsurance, risk adjustment, and risk corridors."). Moreover, the ACA "requires the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase insurance plans." *King v. Burwell*, 135 S. Ct. 2480, 2485 (U.S.

[6] The Liquidator asserts that the ACA "contains no provision authorizing HHS to use offset to pay debt where doing so would be inconsistent with state law." Opp. at 6. But the law does not require such a statement. In any event, the ACA has a preemption clause.

2015). Finally, the preamble to the ACA noted that the Congressional Budget Office ("CBO") had scored the ACA's overall impact on the federal budget. *See Moda*, 892 F.3d at 1316 (citing ACA § 1563(a)). Courts view the ACA as a whole, comprehensive statutory program – one that indisputably specifically relates to the business of insurance.

Looking more specifically at the ACA premium stabilization programs, each of the 3Rs involves flows of money from insurers to HHS and vice versa. 42 U.S.C. § 18061 (reinsurance) (discussing "contributions" from insurers and "payments" to issuers); § 18062 (risk corridors) (discussing "payments in" and "payments out"); § 18063 (risk adjustment) (discussing "payments" and "charges"). As we explained in our motion, MTD at 9, 17, central to HHS's administration of the 3Rs and the Federal Consumer Subsidy programs is HHS's use of netting (offset). 45 C.F.R. § 156.1215. As noted above, the Liquidator does not, and cannot, challenge that the Netting Regulation is inconsistent or unauthorized by the ACA. Similarly, the Liquidator does not, and cannot, challenge that HHS acted consistent with the Netting Regulation when it offset CHIC's 2015 reinsurance payment against other ACA-program amounts CHIC owed to HHS.

Moreover, the Supreme Court has explained that McCarran-Ferguson "does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against *inadvertent* federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank*, 517 U.S. at 39 (emphasis added). Here, of course, the (health) insurance business is the *whole* of the ACA.

Additionally, the Supreme Court explained that Congress passed McCarran-Ferguson to "avoid[] . . . unanticipated interference with state regulation." *Id.* at 40. Congress did not intend

the Act, established in the 1940s, to "avoid[] federal preemption by future federal statutes that indicate, through their 'specific relat[ion]' to insurance, that Congress had focused upon the insurance industry, and therefore, in all likelihood, consciously intended to exert upon the insurance industry whatever pre-emptive force accompanied its law." *Id.* at 40-41. Such is the case here. In passing the ACA, Congress "focused upon the insurance industry," "consciously intend[ing]" to preempt conflicting state law – as demonstrated by the ACA's preemption clause, 42 U.S.C. § 18041(d), which applies squarely here.[7] Se*e* MTD at 18.

The Liquidator tries to parse the ACA's express preemption statute, but the Liquidator cannot dispute that if Colorado law prohibits HHS from netting funds in its administration of the 3Rs and other ACA programs, Colorado law would hinder ACA implementation and interfere with HHS's methods of achieving the ACA's statutory objectives. That Colorado law should not be construed to thwart HHS's administration of the 3R programs is underscored by Colorado's choice not to establish its own reinsurance and risk adjustment programs and instead to have the programs administered by HHS. *See* 45 C.F.R. § 153.210(a), (c); 45 C.F.R. § 153.310(a)(1)-(2). Considered another way, in passing the ACA, did Congress intend that any of the 50 states could pass legislation that would preempt HHS's administration of the 3Rs? Of course not. The Liquidator's argument presumes Congress made the illogical policy choice to require HHS to administer the reinsurance and risk adjustment programs in all non-electing states, but at the same time cripple HHS's ability to do so in the face of contrary state law. The 3Rs, and other

[7] Under the ACA state law is preempted to the extent that it "'hinder[s] or impede[s]' the implementation of the ACA[.]" *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015); *see also Coons v. Lew*, 762 F.3d 891, 902 (9th Cir. 2014) (holding that state law is preempted to the extent it "interferes with the methods by which the [ACA] was designed to reach [its] goal") (citation and quotation marks omitted), *cert. denied*, 135 S. Ct. 1699 (2015).

ACA programs, are administered nationwide and depend upon consistent application of federal law.

IV. Colorado Law Authorizes HHS's Use of Offset

In our motion, we demonstrated that the Liquidator's state law theories are incorrect. We explained that Colo. Rev. Stat. § 10-3-529, which mandates ("shall") offsetting amounts owed by an insurer in liquidation proceedings, is not limited to contractual debts and credits. We further demonstrated that, even if the Court agrees with the Liquidator's interpretation of section 529, the Colorado Supreme Court has recognized common law offset under Colorado law. Finally, we outlined that settled common law recognizes that debts owed between HHS and CHIC are mutual and, therefore, subject to offset. The Liquidator's arguments to the contrary in his opposition are unavailing.

A. Section 529 Permits HHS's Offset

Without citing any legislative history or other supporting authority, the Liquidator argues that the Colorado legislature, in passing section 529, addressed the contracts at issue in *Bluewater Insurance Ltd. v. Balzano*, 823 P.2d 1365 (Colo. 1992), and did not intend to go beyond contract in permitting offset. However, the Liquidator, the Colorado Insurance Commissioner, a member of the National Association of Insurance Commissioners ("NAIC"[8]), fails to inform the Court that section 529 was *not* uniquely crafted to respond to *Bluewater*. Rather, the statute was lifted, nearly verbatim, from NAIC's Insurer Receivership Model Act:

[8] "The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Available at https://naic.org/index_about.htm.

"Mutual debts or mutual credits, whether arising out of one or more contracts between the insurer and another person in connection with any action or proceeding under this Act, shall be set off . . ."[9] Texas has a near-identical provision in its Insurance Code: "All mutual debts or mutual credits, whether arising out of one or more contracts between the insurer and another person in connection with any action or proceeding under this chapter, must be set off." Tex. Ins. Code Ann. § 443.209. Multiple other states have the same or near-identical language. S*ee, e.g.*, Miss. Code Ann. § 83-24-59 (Mississippi); R.I. Gen. Laws § 27-14.3-34 (Rhode Island); N.D. Cent. Code § 26.1-06.1-29 (North Dakota); Kan. Stat. Ann. § 40-3633 (Kansas). The Colorado legislature may have acted in response to *Bluewate*r, but the specific language of the offset statute it passed was a cut-and-paste.[10]

B. The Colorado Supreme Court Has Recognized Common Law Offset

Even if section 529 does not authorize HHS's offset, the Colorado Supreme Court has suggested that the state recognizes common law offset for "the common class of obligations arising out of mutual debts and credits." *Bluewater*, 823 P.2d at 1374. After badly misreading *Bluewater* in his motion for summary judgment, *see* MTD at 26-28, the Liquidator continues to misread the case in his opposition. Opp. at 21-23. In the first part of *Bluewater*, the court concluded that then-existing Colorado statutes did not permit the offset sought by the reinsurer plaintiffs. 823 P.2d at 1369-74. The court then considered whether "a common law analysis

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[9] Available at https://www.naic.org/store/free/MDL-555.pdf.

[10] The United States does not dispute, of course, that section 529 refers to "contracts" in subsections (1), (5) and (6). *See* Opp. at 20. Because most situations involving potential offsets involve monies owed by contract, it is not surprising that NAIC would adopt a model code provision that highlights contractual offset. But, there is nothing in section 529 that purports to *limit* offset to contractual payments. And why would it? The Liquidator has not provided any logical basis for a legal scheme that would allow contractual offset but prohibit offset when debts and credits arise on non-contractual grounds.

would . . . lead to a different result." *Id.* at 1374. In conducting that analysis, the court repeatedly distinguished between the "unique class of fiduciary obligations" exemplified by a reinsurer owed premiums – the facts of the case before it – and a "common class of obligations . . . where the right to offset is normally allowed." *Id.* at 1374-75.

The court did *not* generally reject an "equitable right to offset," as the Liquidator suggests, but found that right was not "so broad as to apply to reinsurance." *Id.* at 1376; *see id.* ("reinsurance contracts in Colorado are not normal contracts to which the equitable right to offset mutual debts applies"). Moreover, the contracts at issue in *Bluewater prohibited* offset by their terms. *Id.* ("it is manifest that the reinsurers agreed to forego the right to offset"). Thus, despite the Liquidator's flawed, contrary interpretation, the Colorado Supreme Court has clearly recognized an equitable right to offset for mutual debts and credits that are not, like reinsurance premiums and the proceeds due under reinsurance policies, unique and fiduciary. Here, the mutual debts and credits between HHS and CHIC are nothing like the private reinsurance contracts at issue in *Bluewater*. Moreover, the *Bluewater* contracts specifically prohibited offset, while HHS's Netting Regulation mandates it.

C. The Liquidator's Mutuality Arguments Fail

The Liquidator continues to argue that debts and credits between HHS and CHIC for ACA programs are not mutual. However, the authorities that the Liquidator relies upon demonstrate that, here, there is mutuality.

In *In re Art Metal U.S.C., Inc.*, 109 B.R. 74 (Bankr. D.N.J. 1989), Opp. at 26, the issue before the court was whether the Pension Benefit Guarantee Corporation ("PBGC") was part of the United States such that it could set off its claims for monies owed by the debtor against amounts owing to the debtor by the United States Postal Service and the Government Services

Administration. The court confirmed that "[t]he basic test of mutuality is not similarity of obligations but whether or not something is owed by each side" and that "[i]t is undisputed as a general proposition of law that the United States government has the right to setoff amounts due it against amounts which it is obligated to pay." *Id.* at 78. The court concluded that the PBGC was not part of the United States because its profits did not go to the government, its losses are not borne by the government, and "none of its money comes from the Federal Government." *Id.* at 79. Thus, "the PBGC lacks sufficient identity with the United States government to enable claims of the PBGC to be setoff against the claims the debtor holds against the GSA and the USPS." *Id.* at 83. Here, HHS is not a separate corporation and is government-funded.

In any event, in *In re Lykes Brothers S.S. Co., Inc.*, 217 B.R. 304, 309 (Bankr. M.D. Fla. 1997), the court rejected *Art Metal*'s "narrow[] constru[ction of] the mutuality requirement" and explained that the Ninth and Tenth Circuits have held that "federal government agencies are treated as a single government unit" for setoff under the Bankruptcy Code. While the Liquidator asks this Court to ignore HHS's obvious government identity and instead look to the characteristics of the underlying ACA programs, that is not what courts do. The *Art Metal* court did not examine the debt that the PBGC sought to set off, as the Liquidator demands here. Rather, the court looked at the characteristics of the claimed government entity – the PBGC. Here, of course, the government entity in question – HHS – is indisputably part of the United States. That is the start and finish of the mutuality question here.

The Liquidator also relies upon *Doe v. United States*, 58 F.3d 494 (9th Cir. 1995). Opp. at 26. But, in that case, after instruction from the court to consult the Solicitor General's office, the United States confirmed that it "a single, unitary debtor" in bankruptcy. *Doe* at 498 (explaining that the United States considers certain federal agencies to be "separate

governmental units when they act in their private receivership capacity.") Here, HHS is not acting in a private receivership capacity. HHS is a federal government agency carrying out a nationwide federal program.

As demonstrated in our motion, there is substantial, unchallenged case law demonstrating that the United States is a single, unitary creditor. The Liquidator does not identify any legal authority where a court has looked beyond a federal agency to analyze whether individual claims are "governmental." There is simply no dispute here that HHS makes payments and receives collections from insurers for the risk adjustment, reinsurance and risk corridors programs. *See* Congressional Budget Office, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, at 11 ("The ACA's provisions for risk adjustment, reinsurance, and risk corridors generate payments by the federal government to insurers and collections by the federal government from insurers. CBO treats the payments as outlays and the collections as revenues . . .").[11] The only question this Court need consider is whether HHS is a part of the United States when it administers those programs. The answer to that question is obvious.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed. Alternatively, the Court should deny the Liquidator's motion for summary judgment and grant summary judgment to the United States.

[11] Available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf.

Dated: May 3, 2019

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