

As discussed in detail in Appellees' October 16, 2006 and November 8, 2006 briefs, St. Croix's "Motion to Extend Stay of Proceedings" continues to ignore the statutory requirements of the Contract Disputes Act ("CDA") and the mandates of the Election Doctrine. Appellees request that St. Croix's motion be denied and that the stay granted on September 5, 2006 be terminated immediately, according to its own terms.

DISCUSSION

St. Croix continues to base its legal position on two faulty assumptions. First, if class certification is granted on appeal in *Zuni*,² then St. Croix is somehow free to ignore its irrevocable election to proceed before this Board and join in the *Zuni* class action. The CDA does not allow a claimant to ignore its initial election. 41 U.S.C. § 609(a)(1). Second, St. Croix assumes, without basis, that it properly invoked the jurisdiction of this Tribunal. However, this case was not filed timely, nor did the materials filed by St. Croix sufficiently state an intention to proceed before this Board within the 90 days mandated by the CDA.

I. Its Irrevocable Decision to File Appeal Before This Board Disqualifies Appellant From Participating in A *Zuni* Class Action

As demonstrated in Appellees' Motion, the CDA is the controlling statute in these matters, yet St. Croix's Motion completely ignores the CDA's legal imperatives. The CDA does not allow St. Croix's election of the CBCA forum to be treated as a mere placeholder. Rather, the CDA requires that St. Croix make an "either-or" choice of forum. This is known as the Election Doctrine. *Nat'l Neighbors, Inc. v. U.S.*, 839 F.2d 1539, 1541-42 (Fed. Cir. 1988). "Under the Election Doctrine, the binding election of forums is an 'either-or' alternative, and, as such, does not provide a contractor with dual avenues for contesting a contracting officer's

² Appellees note that review by the Tenth Circuit of the district court's order denying class certification is discretionary.

adverse decision.” *Id.* Thus, pursuant to the Election Doctrine, the contractor’s election of a forum pursuant the CDA is irrevocable. *Mark Smith Construction Co. v. United States*, 10 Cl.Ct. 540, 542 (1986); *Schickler, TMD U.S.A., Inc. v. United States*, 54 Fed. Cl. 264, 269 (2002). Here, by filing an appeal with this Board, St. Croix irrevocably elected to challenge the Contracting Officer’s decision in this forum and not in Federal Court. Accordingly, nothing that happens before the Tenth Circuit in *Zuni* could have any bearing on this case.

II. St. Croix’s Appeal Did Not Properly Invoke the Jurisdiction of this Board and Should Be Dismissed

Appellees have previously presented our reasons as to why this entire case should be dismissed. St. Croix failed to properly invoke the jurisdiction of this Board when it did not file its “Protective Notice of Appeal” within 90 days of the Contracting Officer’s decision. Additionally, St. Croix did not unequivocally state its intention to proceed before this Board within 90 days as mandated by the CDA. “The mere filing of a document, which is not a ‘proceeding’ on the merits, is not a viable election pursuant to the statute.” *Nat’l Neighbors, Inc. v. U.S.*, 839 F.2d 1539, 1543 (Fed. Cir. 1988).

Although Appellant argues that judicial economy will be served by extending the stay, the opposite is true. Judicial economy will be served by this Tribunal’s clearing its docket by granting Appellees’ meritorious motion to dismiss. All parties will benefit from a decision addressing dismissal of these nine docketed matters.

CONCLUSION

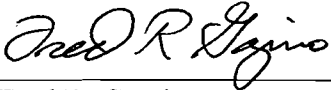
The stay is now a legal nullity. No further stays should be entered. Appellees respectfully request that St. Croix’s motion to extend the stay be denied, and we ask this Tribunal to grant dismissal of these appeals as requested in Appellees’ October 16, 2006 and November 8, 2006 briefs.

Dated: June 12, 2007

Respectfully submitted,

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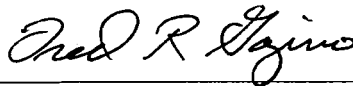
CERTIFICATE OF SERVICE

I, Fred R. Garzino, an attorney, certify that I have caused a copy of the attached document, "Appellees' Opposition to Appellants' Motion to Extend Stay of Proceedings," and proposed "Order Denying Motion to Extend Stay of Proceedings," to be served via Federal Express overnight mail, upon the following persons:

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This 12th day of June, 2007.



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