UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

SABAL TRAIL TRANSMISSION, LLC,

Plaintiff,

Case No.: 1:16-cv-063-MW-GRJ

vs.

REAL ESTATE, et al.,

Defendant(s).
_____/

PLAINTIFF SABAL TRAIL TRANSMISSION, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants' response is most notable for what it does not do: it does not identify for this Court a single authority – from any court anywhere – applying (over a condemnor's objection) a state-law measure of compensation to award a landowner attorney's fees and litigation expenses in a taking under the Natural Gas Act. This Court will search Defendants' brief in vain for that authority.

Rather, in an attempt to mask the truly unprecedented nature of the relief they seek, Defendants deluge this Court with inapposite authorities that either did not involve the Natural Gas Act, did not involve requests for attorney's fees or litigation expenses, or both. Indeed, the case that Defendants describe as "the most on-point federal circuit court case," Opp. at 5, considered *neither* the Natural Gas Act *nor* a request for attorney's fees or litigation expenses. *See Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980) (*en banc*). Further, Defendants do not (and cannot) dispute that the Eleventh Circuit has not extended *Sanders* to Natural Gas Act takings, or even considered such an extension. For these and a litany of additional reasons set forth below – including that applying Florida law regarding attorney's fees here will spawn a second major litigation – this Court should not apply *Sanders* or any of the other inapplicable authorities relied on by Defendants.

Instead, in deciding the question presented by Sabal Trail's Motion – which question the Eleventh Circuit has never decided – this Court should follow precedents from the United States Supreme Court and the Eleventh Circuit. Those

authorities make clear all the Court needs to know: (1) when a condemnor exercises federal eminent-domain authority under the Natural Gas Act, federal law supplies the exclusive measure of just compensation, because the measure of compensation concerns a substantive right grounded in the United States Constitution; and (2) even assuming state law applies, a federal court addressing a Natural Gas Act taking is without authority to award the landowner attorney's fees and expenses. These points are independent grounds to grant Sabal Trail's Motion.

I. U.S. Supreme Court and Eleventh Circuit precedents dictate that in a taking under the Natural Gas Act, federal law supplies the exclusive measure of just compensation.

This Court should grant Sabal Trail's Motion because Defendants do not rebut the primary basis for it – namely, that controlling United States Supreme Court and Eleventh Circuit precedents dictate that in a taking under the Natural Gas Act, federal law supplies the exclusive measure of compensation. The United States Supreme Court long ago explained that federal law must determine the proper measure of compensation for a taking effected pursuant to federal authority because just compensation is a substantive right under the United States Constitution. *See United States v. Miller*, 317 U.S. 369, 379-80 (1943) (describing "the measure of compensation" as a "question[] of substantive right … grounded upon the Constitution of the United States"). Defendants leave unanswered three key pieces of Sabal Trail's argument about *Miller*, as follows.

A. Defendants' assertion that *Miller* does not apply when a private entity exercises federal eminent-domain authority fails because that distinction does not matter (or even exist) in a Natural Gas Act case.

Defendants' assertion that *Miller* does not apply here because a private entity is exercising federal eminent-domain authority fails because that distinction does not matter in a Natural Gas Act case. Mot. at 11, 23. The United States Supreme Court has long held that the federal government's eminent domain "power is not changed by its transfer to another holder." *Kohl v. United States*, 91 U.S. 367, 372 (1875); *accord Thatcher v. Tennessee Gas Trans'n Co.*, 180 F.2d 644, 647 (5th Cir. 1950).

Further, the distinction between a government taking and a private taking does not matter in a Natural Gas Act case because *it does not even exist in such a case*. The United States itself *never* builds natural gas pipelines; instead, it *always* delegates to private companies the activities necessary to further the federal interest in such infrastructure. This is a critical difference between a taking under the Natural Gas Act and a taking under Section 21 of the Power Act, on which Defendants rely. When a licensee (rather than the United States itself) executes a taking under Section 21 of the Power Act, the mere fact of the licensee's presence undercuts the federal interest in the taking, because the inference is that if the federal interest were really significant, the United States would be doing the taking itself. *See Sanders*, 617 F.2d at 1118. That inference is always absent in Natural

Gas Act takings, which are always (by congressional design) accomplished by private parties.

Without engaging these arguments, *see* Opp. 1-30, Defendants blithely assert that *Miller* is "easily distinguishable" because it involved a taking by the federal government rather than a private licensee. Opp. at 3. Defendants do not address *Kohl* or *Thatcher*; point this Court to any authority distinguishing those cases;[1] explain any reason why their purported distinction makes sense in a Natural Gas Act case; or identify any court that has held that it matters in a Natural Gas Act case. In the absence of any authority considering, let alone crediting, Defendants' purported distinction of *Miller*, this Court should reject it out of hand.

B. Defendants' assertion that *Miller* has been distinguished in Natural Gas Act cases is demonstrably inaccurate.

Remarkably, Defendants assert – without citation – that *Miller* "has been specifically addressed and distinguished in the cases that hold state substantive law applies to compensation under the [Natural Gas Act]." Opp. at 3. Defendants' brief contains no authority for this assertion, *see* Opp. at 1-30, and it is wrong.

Defendants erroneously accuse Sabal Trail of misrepresenting that only two

[1] Without any authority, Defendants assert that Sabal Trail is a "licensee" under the Natural Gas Act. *See* Opp. at 28, 30. That is wrong because there is no such thing as a "licensee" under the Natural Gas Act. Defendants' reference to Sabal Trail as a "licensee" is an entirely unsupported attempt to lift terminology that has legal significance in the context of the Power Act (*see infra* at 18-19) into the context of the Natural Gas Act, where it has no relevance whatsoever.

courts have considered *Miller*'s application to conflicts between federal and state-law measures of compensation in Natural Gas Act cases, and Defendants direct this Court to 13 other cases. *See* Opp. at 15-17. But *none of Defendants' cases considers* Miller*'s application to conflicts between federal and state-law measures of compensation in a Natural Gas Act case.*[2] Further, Defendants suggest that the "Tenth Circuit has addressed this issue." Opp. at 11 (citing *Bison Pipeline, LLC v. 102.84 Acres*, 560 F. App'x 690 (10th Cir. 2013)). But the Fifth Amendment argument was waived, not decided, in *Bison Pipeline*. *See id.* at 695.

Ultimately, far from distinguishing *Miller* in Natural Gas Act takings, Defendants have buried the Court in a heap of non-responsive cases. Sabal Trail is

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[2] *See Sanders*, 617 F.2d at 1116-19 (not a Natural Gas Act case); *Fla. Gas Trans'n Co. v. 9.854 Acres*, 1999 WL 33487958, at *1 (S.D. Fla. May 27, 1999) (parties stipulated to application of Florida substantive law; in any event, does not mention *Miller*); *Cadeville Gas Storage v. 10.00 Acres*, 2013 WL 6712918, at *9 (W.D. La. Dec. 20, 2013) (not considering *Miller* for this point); *Perryville Gas Storage v. Dawson Farms*, 2012 WL 5499892, at *7–8 (W.D. La. Nov. 13, 2012) (not mentioning *Miller*); *Texas Gas Trans'n v. 18.08 Acres*, 2012 WL 6057991, at *5 (N.D. Miss. Dec. 6, 2012) (same); *Columbia Gas Trans'n v. Booth*, 2016 WL 7439348, at *3 (N.D. Ohio Dec. 22, 2016) (same); *Spears v. Williams Nat. Gas Co.*, 932 F. Supp. 259, 260-61 (D. Kan. 1996) (same); *N. Nat. Gas Co. v. Kingman*, 2 F. Supp. 3d 1174, 1179 (D. Kan. 2014) (same); *Tenn. Gas Pipeline Co. v. 104 Acres*, 780 F. Supp. 82, 85 (D.R.I. 1991) (same); *Portland Nat. Gas Trans'n Sys. v. 19.2 Acres of Land*, 195 F. Supp. 2d 314, 319-20 (D. Mass. 2002) (same); *Maritimes & Ne. Pipeline v. 0.714 Acres*, 2007 WL 2461054, at *9 (D. Mass. Aug. 27, 2007) (same); *Rockies Exp. Pipeline v. 77.620 acres*, 2010 WL 3034879, at *2 (C.D. Ill. Aug. 3, 2010) (same); *Equitrans, L.P. v. 0.56 Acres*, 2016 WL 3982479, at *1 (N.D.W. Va. July 22, 2016) (same); *Ozark Gas Trans'n Sys. v. Barclay*, 662 S.W.2d 188, 189–90 (Ark. App. 1983) (same).

not bound by the strategic decision of other parties not to rely on *Miller*; nor is this Court bound by those cases. *See, e.g., Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co.*, 240 F.3d 956, 965 (11th Cir. 2001); Mot. 22-32. Indeed, Defendants' cases are not even persuasive – they cannot explain why this Court should reject an argument those courts did not consider.

In actuality, only two other courts have considered *Miller*'s application to conflicts between federal and state-law measures of compensation in Natural Gas Act cases, and ***both*** have held that *Miller* requires use of the federal measure. *See Columbia Gas Trans'n v. 252.071 Acres*, 2016 WL 7167979, at *3 (D. Md. Dec. 8, 2016): *Tenn. Gas Pipeline Co. v. 1.7320 Acres*, 2014 WL 690700, at *9 (M.D. Pa. Feb. 24, 2014). In the absence of any authority even considering Defendants' purported distinction of *Miller* – a decision of the U.S. Supreme Court – this Court should reject the distinction and adopt *Columbia Gas* and *Tennessee Gas Pipeline*.

C. Defendants' assertion that *Miller* does not apply fails because Congress is presumed to have left *Miller*'s rule in place when it enacted the eminent domain provision of the Natural Gas Act.

Finally, Defendants' attack on *Miller* fails because they do not deny that when Congress enacted the eminent-domain provision of the Natural Gas Act – four years after *Miller* was decided – Congress is presumed to have been aware that under *Miller*, its provision that federal courts should apply state-law "practice and procedure" in eminent-domain proceedings under the Natural Gas Act would

not disturb the application of federal *substantive* law as to the measure of compensation. *See, e.g.*, *Merrill Lynch v. Curran*, 456 U.S. 353, 382 n.66 (1982). This presumption "is itself evidence that Congress affirmatively intended" to preserve the application of the federal measure of compensation. *Id.* at 381-82.

In the light of this omission, Defendants' assertion that Sabal Trail misses a distinction between substantive and procedural law is misplaced. *See* Opp. at 21-22. Because the measure of compensation is a matter of substantive constitutional law, this Court must presume that when Congress enacted the eminent-domain provision of the Natural Gas Act, Congress intentionally left intact the rule that federal law controls that issue in federal court. For this separate and independent reason, this Court should reject Defendants' purported distinction of *Miller*.

Ultimately, far from citing a "plethora of authority," Opp. at 17, Defendants have offered no relevant precedent to contradict *Miller's* instruction that this Court should look to federal constitutional law to supply the exclusive measure of just compensation. Cases that do not address *Miller* are not responsive, nor are cases that do not address the Natural Gas Act. Accordingly, the principal basis for Sabal Trail's Motion remains undisturbed, and the Motion should be granted.

II. Defendants have failed to identify any authority for this Court to apply Florida's measure of full compensation to award attorney's fees, litigation expenses, or costs.

There is a second and separate reason why Defendants' opposition fails: it

fails to identify any authority for this Court to award Florida's measure of full compensation. Critically, Defendants' clearly seek full compensation – not just compensation. Opp. at 17-18. But because Sabal Trail is in a federal court exercising a federal power of eminent domain, just compensation is the only applicable measure. *See* Mot. at 14-15 (citing *Kohl*, 91 U.S. at 374, which states that the federal eminent-domain power "can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised."). Defendants have given this Court – a federal court addressing a taking effected pursuant to the federal power of eminent domain – no reason to apply any measure other than the one stated in the Fifth Amendment: just compensation.[3]

Further, in response to Sabal Trail's argument that regardless whether this Court elects to apply federal or state law, this Court is without authority to award attorney's fees, expenses, or costs (*see* Mot. at 19-22), Defendants have failed to identify any authority for this Court to award such amounts (*see* Opp. at 17-26).

Standing alone, these deficits of authority should cause the Court to grant Sabal Trail's Motion; if this Court is without authority to award fees and expenses, it should rule that those amounts are not due.

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[3] *Sanders* does not answer this point: both Georgia and federal substantive law require just compensation. *See* 617 F.2d at 1115. *Sanders* specifically declined to address the availability of attorney's fees, at issue here under Florida's doctrine of "full compensation." *Id.* at 1115 n.4.

A. This Court should disregard Defendants' attempt to paper over the absence of legal authority for its requested relief by focusing on pipelines' purported settlement practices.

In an attempt to obscure the complete absence of any authority for this Court to award attorney's fees, litigation expenses, or costs, Defendants resort to an argument that in the past, natural gas pipeline companies have voluntarily agreed to pay attorney's fees and litigation expenses as part of litigating and settling condemnation cases. This Court should disregard that argument for two reasons.

First, it is a red herring. Defendants say that Florida Gas Transmission once "acknowledged" that landowners are "entitled" to fees under the Natural Gas Act. Opp. at 19. But that is merely some other litigant's strategic decision in some other case. Because the issue was conceded, it was not decided in that case. *See, e.g.*, *Brown Jordan Int'l, Inc. v. Carmicle*, 846 F.3d 1167, 1175 (11th Cir. 2017). In any event, that case does not control Sabal Trail's rights here. *See, e.g.*, *Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co.*, 240 F.3d 956, 965 (11th Cir. 2001).

Second, this Court should disregard Defendants' argument because it invites error. Defendants say that Sabal Trail has paid attorney's fees and expenses as part of settlement agreements. But it is axiomatic that courts may not consider settlement evidence for this prohibited purpose, Fed. R. Evid. 408,[4] or inadmissible

[4] To ensure the record is clear, Sabal Trail will file separately a motion to strike that improper argument and evidence.

evidence on summary judgment, *United States v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994); and litigants may not rely on inadmissible evidence to oppose summary judgment, *Home Depot v. U.S. Fire Ins.*, 299 F. App'x 892, 895 (11th Cir. 2008).

Defendants then bluster that Sabal Trail "asks this Court to ignore vast legal precedent" supporting a grant of attorney's fees and expenses, Opp. at 19, but that is empty rhetoric. There is no citation at the end of that sentence, nor anywhere else, to a single case actually deciding that a condemnor in a Natural Gas Act case must pay a state-law measure of compensation that includes attorney's fees.

B. Defendants' failure to respond to Sabal Trail's specific arguments that attorney's fees and litigation expenses are not allowed in Natural Gas Act takings forecloses the relief Defendants seek.

Crucially, Defendants do not even engage, let alone rebut, either piece of Sabal Trail's argument as to why this Court is without authority to award compensation that includes amounts for attorney's fees or litigation expenses. Defendants' failure in this regard forecloses the relief they seek.

First, Defendants have no response to Sabal Trail's explanation that the American Rule requires a specific *federal* statutory authorization for fees before a federal court may award them. Mot. at 20. Defendants describe as "obvious" that "fees and costs are not awardable absent a legal … basis," and point to Florida law as the purported "basis." Opp. at 21, 23. But that is *not* the American Rule.

According to the United States Supreme Court, "[u]nder th[e] American

Rule, we follow a general practice of not awarding fees to a prevailing party *absent explicit statutory authority*." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (emphasis added); *accord Alyeska Pipeline Services Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975) (discussing Congress' "specific and explicit provisions for the allowance of attorneys' fees under selected statutes" and observing that "it is apparent that the circumstances under which attorneys' fees are to be awarded … are matters for Congress to determine"); *United States v. Bodcaw*, 440 U.S. 202, 204 (1979) (describing congressionally-authorized fee awards as "a matter of legislative grace"); *Design Pallets, Inc. v. Gray Robinson*, 583 F. Supp. 2d 1282, 1285 (M.D. Fla. 2008) (refusing to apply Florida fees statute in federal-question case because American Rule disallows fee awards in federal courts absent a federal statute).[5]

Second, Defendants do not deny that litigation costs such as expert witness fees "are never allowed in condemnation cases in Federal Courts." *Kirby Lumber Corp. v. Louisiana*, 293 F.2d 82, 87 (5th Cir. 1961); *accord* Mot. at 21-22. *See* Opp. at 1-30 (not mentioning *Kirby Lumber*). Instead, Defendants suggest that Rule 71.1(*l*) "was meant to protect" landowners "from paying the litigation costs of

[5] Further, attorney's fees may not be awarded as an expansion of costs in a Natural Gas Act taking because, as Sabal Trail explained, *see* Mot. at 21, costs in such takings "are not subject to" Rule 54(d). *See* Fed. R. Civ. P. 71.1(*l*). *See generally Alyeska Pipeline*, 421 U.S. at 250-63 (explaining limited circumstances under which Congress allows fees as an expansion of costs).

the condemning authority." Opp. at 25. But that assertion does not supply the missing basis for a condemnor in federal court to pay a landowner its fees or expenses. Indeed, Defendants' attempt to reassure the Court that Rule 71.1(*l*) "does not strip this Court of its authority" to award litigation expenses, Opp. at 25-26, is just more empty rhetoric. The point is the authority never existed in the first place.

In truth, the effect of Rule 71.1 is to foreclose any award of attorney's fees to Defendants. Controlling precedent establishes that Rule 71.1 "not the practice and procedure language of § 717f(h) and not state law, governs the proceedings" in a Natural Gas Act taking. *See S. Natural Gas Co. v. Cullman Cty.*, 197 F.3d 1368, 1373, 1375 (11th Cir. 1999). Because the Florida statute providing for fee awards in takings cases, *see* Fla. Stat. § 73.092, is in the Practice and Procedure title of the Florida Statutes, Rule 71.1 and *Cullman County* forbid its application here.

Aside from *Miller*, this Court should refuse to take the truly unprecedented step that Defendants request with respect to attorney's fees and expenses. Sabal Trail identified the absence of authority to award those amounts as an independent reason why its Motion should be granted even if the Court applies Florida law to determine property values. Mot. at 19. Still, Defendants came up empty: they failed to identify a single case actually deciding that a federal court may award fees or expenses in a Natural Gas Act taking. In the absence of authority to award the amounts Defendants request, the Court should rule that they are not due.

III. Defendants' opposition highlights the reason why federal courts may award fees only if there is an express federal statutory permission.

Critically, Defendants' opposition highlights the reason why federal courts may award fees only if there is an express federal statutory permission to do so. As the United States Supreme Court explained in *Buckhannon*, the rule that "a request for attorney's fees should not result in a second major litigation" has caused the Court to "avoid[]" interpreting statutes in way that would "spawn[] a second litigation of significant dimension." 532 U.S. at 609. Defendants' opposition suggests that awarding fees and expenses in federal court will involve a simple calculation, *see* Opp. at 18 & n.10, but to the contrary, what would ensue is precisely the "second major litigation" the Supreme Court rejected. Here is why:

- The Florida statute assumes that a "first written offer" sets the basis for determining the benefit-based attorney's fee because the Florida power of eminent domain may not be exercised until a written offer of compensation is made. *See* Fla. Stat. §§ 73.015(1)(b) & 73.092(1)(a). Because this requirement is missing in a Natural Gas Act taking, further litigation will be required to determine what constitutes the "first written offer" for purposes of determining any betterment-based attorney's fee.
- Florida law also requires the condemnor to pay the owner's attorney's fees when there is any apportionment litigation or any other "supplemental proceedings." *See* Fla. Stat. § 73.092(2). Attorney's fees under this section are determined based on six separate statutory criteria, *see* Fla. Stat. § 73.092(2)(a)-(f), each a potential subject of further litigation.
- Finally, if the parties cannot agree on whether expert witness fees are "reasonable," litigation will be needed to determine what is owed, and then how much the condemnor must pay the owner's attorney's fees for litigating the amount of the expert's fees, encouraging even more litigation after the litigation. *See* Fla. Stat. § 73.091(1).

These are but a few examples of the "second major litigation" that will ensue if this Court applies Florida's "full compensation" measure of compensation. These are exactly the kinds of reasons why federal law restricts fee awards to situations expressly allowed by Congress, and why this Court should not become the first federal court to undertake to award such fees in a Natural Gas Act taking absent a party's express agreement to pay them.

IV. Defendants have failed to demonstrate that this Court must or even should apply *Sanders* in this case.

Defendants describe *Sanders* as "the most on point federal circuit court case" and "binding" on this Court, *see* Opp. at 3,4,5, but Defendants have utterly failed to demonstrate that this Court must or even should apply *Sanders*. Defendants do not dispute that this Court is not *required* to apply *Sanders*, and Defendants' reasons why this Court *should* apply *Sanders* are fatally flawed. *Sanders* neither requires nor supports denial of Sabal Trail's Motion.

A. Defendants do not dispute that *Sanders* is not binding on this Court.

All agree that *Sanders* is not binding here. Although *Sanders* is the cornerstone of Defendants' Opposition, Defendants do not – and cannot – deny that it is not binding here because the Eleventh Circuit has not extended it to Natural Gas Act cases, nor even considered such an extension. *See* Mot. at 24. Critically, in a case that Defendants cite, Opp. at 21, the Eleventh Circuit has expressly acknowledged that although a Power Act case may be persuasive in a

Natural Gas Act case depending on the facts, a Power Act case is not binding in a Natural Gas Act case. *Cullman Cty.*, 197 F.3d at 1374-75.

B. Defendants' reasons why this Court should apply *Sanders* are fatally flawed.

This Court should disregard *Sanders* even as a persuasive authority because Defendants' reasons why the Court should follow it are fatally flawed. Most notably, Defendants twice argue, erroneously, that the Fifth Circuit has extended *Sanders* to Natural Gas Act cases. *See* Opp. at 8, 26 (citing *Miss. River Trans'n Corp. v. Tabor*, 757 F.2d 662, 665 nn. 2-3, 5 (5th Cir. 1985)). Defendants' reliance on *Tabor* misses the mark for multiple reasons. As an initial matter, this Court is in the Eleventh Circuit, so *Tabor* is not binding.[6] In any event, Defendants are wrong that *Tabor* "expanded *Sanders*" to reach Natural Gas Act takings. Indeed, *Tabor* did not even ***cite*** *Sanders*. *See* 757 F.2d 662-76. Further, as Sabal Trail explained in its Motion, *Tabor* applied state law to a taking effected under both state and federal eminent-domain authority. Here, Sabal Trail is exercising an exclusively-federal eminent domain authority. As a result, the condemnor in *Tabor* was not identically situated to Sabal Trail here.

In any event, Defendants' reliance on *Tabor* fails for the separate reason that

[6] "[T]he decisions of one circuit are not binding on other circuits." *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981). The Fifth Circuit decided *Tabor* in 1985, four years after the former Fifth Circuit was divided into two circuits.

the premise of its choice-of-law analysis is no longer good law. *Tabor*'s decision to apply Louisiana substantive law rested on the "practice and procedure" language in Section 717f(h) of the Natural Gas Act. *See id.* at 665 n.3. Section 717f(h) has been superseded by Federal Rule of Civil Procedure 71A, and "Rule 71A, not the practice and procedure language of § 717f(h) and not state law, governs the proceedings in [a Natural Gas Act taking] case." *Cullman Cty.*, 197 F.3d at 1374.[7]

C. Defendants do not deny that there are critical distinctions between *Sanders* and this case that foreclose application of *Sanders* here.

There is a separate and independent reason why *Sanders* is not persuasive here – namely, Defendants do not (and cannot) deny that there are critical distinctions between *Sanders* and this case that foreclose application of *Sanders* here. As Sabal Trail has explained (Mot. at 25-26), *Sanders* did not involve application of a state-law measure of compensation that would have awarded fees and expenses. Rather, *Sanders* applied a state-law measure of compensation that altered the valuation of the property at issue. Accordingly, the *Sanders* court did not consider Sabal Trail's argument that a federal court lacks authority to award

[7] It is "surprising[]" that some courts ever "read the phrase 'practice and procedure' to encompass state substantive law as well as formal practice." *See Portland Nat. Gas Trans'n Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 282 n.1 (1st Cir. 2003) (referring to *Columbia Gas Trans'n Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1194–99 (6th Cir.1992)). Now that the "practice and procedure" language has been superseded, there can be no doubt that it does not furnish a basis for looking to state substantive law in a Natural Gas Act taking.

fees or expenses in a Natural Gas Act taking. Had *Sanders* considered that argument, the result likely would have been different, because its federal-objective analysis should have come out the other way. As *Sanders* explained, "the choice of law question … is a close one." 617 F.2d at 1124. The absence of an express fee authorization in the Natural Gas Act materially changes the calculus, because it indicates that Congress's objective was to *exclude* fees and expenses from compensation awards, and application of state-law measures that would *include* those amounts necessarily frustrates that objective.

D. Defendants do not deny that if this Court were to apply *Sanders'* framework to a Natural Gas Act case, it would look to federal law to supply a uniform federal measure of compensation.

Finally, Defendants do not deny that even if this Court were to apply *Sanders*, the result would be that the Court would apply federal law as an exclusive, uniform federal measure of compensation. Mot. at 26-28. Defendants miss the boat on this argument entirely: they simply insist that the Power Act and Natural Gas Act are "mirror images." Opp. at 26-28. To be sure, some parts of the statutes are quite similar. But *as relevant here*, their respective purposes and functions are materially different. The Natural Gas Act resides in Title 15 of the United States Code, which covers Commerce and Trade; this is consistent with the purpose of the Act to regulate *interstate* transportation of natural gas. The Natural Gas Act covers facilities that are contained within one state (such as a compressor

station or storage facilities), but only if the facility is related to the construction, operation, and/or expansion of *interstate* facilities. The Natural Gas Act is all about interstate commerce, a uniquely federal issue.

Defendants incorrectly assert that the purpose of the Natural Gas Act was simply to "protect consumers." According to the Supreme Court, the purpose of the Natural Gas Act "was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." *Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506 (1942). The Act is a "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

In stark contrast, the "purpose of the Power Act was to remove impediments to development of *local power plants* by granting licensees permission to infringe upon the federal navigational servitude." *Sanders*, 617 F.2d at 1127 (Fay, J., concurring) (emphasis added); *accord* 59 Cong. Rec. 246 (1919) (legislative history of the Power Act). Power Act licenses are almost always confined to one state: according to the FERC website Defendants cite, Opp. at 28-29, in 2016 and 2017, all active Power Act licensees were within one state.

Indeed, *Sanders* exemplifies the locality of Power Act takings: there, "a private, Georgia utility company desire[d] privately-owned Georgia land from Georgia citizens for a private hydroelectric power and recreation project in Georgia to supply power to Georgia citizens and to provide profit to private investors." 617 F.2d at 1124 (Fay, J., concurring). Under the Power Act, the "[g]rant of a federal license is conditioned on the project's being one that the United States should *not* undertake." *Id.* (emphasis added). By definition the Power Act is all about *intrastate* projects; and in projects by private licensees, all about projects the federal government has declined to undertake.

It simply defies reality to say that the federal interests in condemnations by private entities under the Power Act mirror those in interstate-project related condemnations under the Natural Gas Act (which are always by private entities). Rather, there is a strong interest in a uniform federal rule in Natural Gas Act takings. *Tenn. Gas Pipeline Co.*, 2014 WL 690700, at *10; Mot. 26-30.

Given the differences between the Natural Gas Act and the Power Act, were this Court to conduct a *Sanders* analysis of whether, under *United States v. Kimbell Foods*, 440 U.S. 715, 726 (1979), federal courts should look to state law to supply the federal rule on the question whether fees and expenses are recoverable in Natural Gas Act takings, the Court would conclude that they are not, because "federal interests are sufficiently implicated to warrant the protection of federal

law." *Sanders*, 617 F.2d at 1115 (quoting *Kimbell Foods*). In addition to the differences between the Natural Gas Act and the Power Act, the "second major litigation" that will result if a federal court undertakes to apply Florida's fee statute, *see supra* at 13-14, requires application of federal law to protect the federal interest in effectuating Natural Gas Act takings.

Accordingly, even if this Court were to apply *Sanders*, it would look to federal law to supply an exclusive, uniform measure of compensation. This result is consistent with the result in Circuits that have adopted *Sanders* to look to state law in Power Act cases but used it to apply federal law as a uniform rule in other contexts. The Second Circuit has taken this approach. *See Winooski Hydroelectric Co. v. Five Acres*, 769 F.2d 79, 81-82 (2d Cir. 1985); Mot. at 31.[8]

For all the reasons articulated in its Motion and in this Reply, Sabal Trail requests that this Court enter a partial summary judgment in its favor that the exclusive measure of compensation applicable to these actions is just compensation pursuant to the Fifth Amendment to the United States Constitution and federal law, which does not include attorney's fees or litigation expenses.

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[8] Defendants erroneously assert that Sabal Trail "misrepresent[ed] the holding of *Winooski*." Opp. at 12. Sabal Trail's citation (*see* Mot. at 31) accurately reflects that *Winooski* adopted *Sanders* and that another case, *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1266-67 (2d Cir. 1987), applied *Sanders* to require a different result because application of state law would frustrate a compelling federal interest in a uniform rule.

Certificate of Service

I hereby certify that on May 25, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to any filing users who may have entered an appearance in this action.

As to any Defendant who is unrepresented, does not utilize CM/ECF, and has an address known to Plaintiff, I hereby certify that on May 25, 2017, I mailed the foregoing to the party's last known address, as authorized by Federal Rule of Civil Procedure 5(b).

As to any Defendant who is unrepresented and whose address is unknown to Plaintiff, I hereby certify that on May 25, 2017, I have caused the foregoing to be served thereon by leaving a copy of the foregoing with the clerk, pursuant to Federal Rule of Civil Procedure 5(b)(2)(D).

HARRIS HARRIS BAUERLE ZIEGLER LOPEZ

/s/ Bruce M. Harris

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