THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA et al., Plaintiffs, vs. STATE OF WASHINGTON, et. al. Defendants.	Case No. C70-9213 Sub-Proceeding 05-04 SUQUAMISH TRIBE'S MOTION FOR SUMMARY JUDGMENT BASED ON THE EQUITABLE DOCTRINES OF JUDICIAL ESTOPPEL, RES JUDICATA AND LACHES Note on Motion Calendar: December 7, 2012

COMES NOW Respondent, Suquamish Tribe ("Suquamish"), by and through its Attorney of Record, Michelle Hansen, and requests that the Court enter summary judgment in the above entitled subproceeding in favor of Suquamish and against the petitioner Tulalip Tribes ("Tulalip"). Suquamish's grounds for summary judgment are Judicial Estoppel, *Res Judicata* and Laches. Suquamish will address each ground for summary judgment separately below.

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I. INTRODUCTION

In February 1974, Judge George Boldt determined that the Tribes who signed the 1855 Treaty of Point Elliot reserved for themselves in perpetuity the right to continue fishing in all usual and accustomed locations where they fished during and before treaty time ("U & A"). *U.S. v. Washington*, 384 F. Supp. 312, 314 and 355-357 (W.D.Wash. 1974). These treaty fishing rights vested at the time of the signing of the treaties. *U.S. v. Washington*, 520 F.2d 676, 692 (9th Cir. 1974). In its 1974 opinion and in subsequent orders the court adjudicated the U & A of individual tribes. The court maintains continuing jurisdiction, which in part enables Tribes to request additional U & A, and also ensures fishing occurs in accordance with the injunctions and implementation plans of the case. *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), Paragraph 25. This subproceeding involves Tulalip's attempt to revisit the geographic extent of Suquamish's 1975 adjudicated U & A.

II. STATEMENT OF THE CASE

In this subproceeding Tulalip seeks a ruling that Suquamish's 1975 adjudicated U & A does not include the "sheltered waters on the east side of Puget Sound" which it defines as the "East side of Admiralty Inlet, (including Admiralty Bay, Mutiny Bay, Useless Bay, and Cultus Bay), Saratoga Passage, Penn Cove, Holmes Harbor, Possession Sound (south to Point Wells), Port Susan, Tulalip Bay, and Port Gardner." ("case area") *Tulalip Tribe's Amended Request for Determination*, ("Amended Request") filed November 30, 2007, Dkt. 81, 1:20-24. Tulalip bases its claim on its own interpretation of two orders, i.e. it claims that the phrase "western side" of "this portion" of Puget Sound in Judge Boldt's 1975 Suquamish U & A ruling, *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D.Wash. 1978), limits Suquamish to "specific

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geographic references on the west side of Puget Sound" and that the Ninth Circuit Court's ruling in *U.S. v. Suquamish Tribe*, 901 F.2d 772 (9th Cir. 1990) limits Suquamish to the "west side of Puget Sound". Amended Request, 6:7-18 and 8:6-9.

Tulalip also claims there is no direct or indirect evidence in the record of Suquamish having U & A in the case area, that Suquamish is fishing outside its U & A, is barred by *res judicata* from arguing it can fish on the east side of Puget Sound and is violating a 1994 shellfish stipulation order. Amended Request 4:21-5:5; 7:7-18l; 10:1-28; 11:1-6.

Suquamish denies all of Tulalip's claims and asserts affirmative defenses of Estoppel, *Res Judicata* and Laches. *U.S. v. Washington*, Subp. 05-04, *Suquamish Tribe's Answer, Affirmative Defenses and Counterclaim for Breach of MST Settlement Agreement*, dated January 10, 2012, Dkt. 19699/139, 1:24-15:3. Suquamish also asserts as an affirmative defense and a counterclaim that Tulalip has breached the parties' 1983 Muckleshoot, Suquamish and Tulalip Settlement ("MST Settlement") by failing to bring its complaint against Suquamish in compliance with the terms of the settlement agreement. *Id*. at 15:4-22. Suquamish further asserts as an affirmative defense that if the court determines there is no evidence in the record, then pursuant to Paragraph 25(a)(6) of Judge Boldt's 1974 Injunction and Implementation Order, as amended, Suquamish has the right to present new evidence establishing that it has U & A in the case area. *Id*. at 15:16-24.

III. STATEMENT OF PROCEDURAL HISTORY

Neither Suquamish nor Tulalip was an original party to *United States v. Washington* ("U.S. v. WA") but both intervened after Judge Boldt's February 4, 1974 Decision. On April 18, 1975, Judge Boldt adjudicated Suquamish's U & A as follows:

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> "The usual and accustomed fishing places of the Suquamish Tribe include the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal."
> *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978).

On June 11, 1975, Tulalip filed its first request for a U & A determination in which it claimed to have U & A in, among other vast areas, "**all marine waters of Puget Sound."** *United States v. Washington*, subproceeding 05-04, Order on Motion to Dismiss, p. 2:21-27, Dkt. #1127/17. This phrase is identical to the phrase Judge Boldt used in 1975 to describe Suquamish's U & A. *U.S. v. Washington*, 459 F. Supp. at 1049. Tulalip also claimed to have exclusive fishing rights in marine waters that virtually mirror the case area here. *Id*.

On September 10, 1975, Judge Boldt denied Tulalip exclusive fishing rights in any fresh or marine water and provisionally described Tulalip's U & A as "Starting at Admiralty Head going south to include Admiralty Bay and Admiralty Inlet, then going southeast to include Mutiny Bay and Useless Bay, then going northeast to include Possession Sound and Port Gardner Bay, then going northwest to include Port Susan to a line drawn west of Kyak Point." *U.S. v. Washington*, 459 F. Supp. 1020, 1058 (W.D. Wash. 1978).

On September 5, 1980, Tulalip asked the court to make permanent its 1975 U & A adjudication and sought additional non-exclusive marine U & A starting from the Fraser River in Canada south to Commencement Bay and west to the western edge of the Strait of Juan de Fuca. *U.S. v. Washington*, *Amended Request for Determination Re: Tulalip Tribes of Washington – Usual and Accustomed Fishing Places*, dated July 21, 1982, Dkt. #8485. Tulalip additionally included Port Susan and State Catch Reporting Areas 10E, 11, 11A and 13 in Central and South Puget Sound in its amended request. *Id*. Prior to trial Tulalip and Suquamish

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settled their dispute and executed the MST Settlement Agreement that was later approved and entered as an order by the court. *U.S. v. Washington*, 626 F. Supp. 1405, 1476-78 (W.D. Wash. 1985). Tulalip proceeded to trial against the Lummi Nation ("Lummi"), who had refused to settle.

On April 13, 1983 Tulalip filed its pre-trial brief. *U.S. v. Washington*, Dkt. 8902. The most salient point about this brief is Tulalip's insistence that the court use the same evidentiary and legal proof standard used in Suquamish's 1975 U & A proceedings to determine its expansion request. Otherwise, Tulalip protested it would be "unfairly punished" by being limited to its existing small U & A. *Id*. at p. 5:3-16.

On June 11, 1984 Tulalip filed its Closing Arguments. Tulalip persuasively argued again that the court must use the same evidentiary and legal standards established by Judge Boldt in the 1975 Suquamish proceeding to determine its request. On January 15, 1986, Tulalip succeeded in convincing Judge Craig to use this standard of proof because and, as a result, Tulalip was able to radically expand its fishing places. *U.S. v. Washington*, Dkt. 10,219.

In 2003 Tulalip unsuccessfully attempted to restrain Suquamish from commercially crabbing in State Shellfish Catch Reporting Area 2E, the marine area comprised of Possession Sound inland to the marine waters adjacent to the Snohomish River. In that subproceeding, Tulalip represented to this Court that it was not contesting Suquamish's U & A in the area, just complaining about Suquamish's failure to participate in negotiations of the inter-tribal plans and alleged failure to sign the State-Tribal plan in a timely manner. *Tulalip Tribes, Swinomish Indian Tribal Community, and Upper Skagit Tribe's Petition for Review and Objection to*

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Disposition, filed December 15, 2003, in subproceeding No. 89-3, p.3: 12 – 19; Dkt.# 17612/14386.

In 2005, Tulalip joined the Upper Skagit Indian Tribe in claiming Suquamish's 1975 U & A was ambiguous because there was no evidence in the record before Judge Boldt in that subproceeding to infer that Judge Boldt intended to include Saratoga Passage and Skagit Bay in Suquamish's U & A. Tulalip also subsequently filed this request challenging Suquamish U & A based on different legal theories.

In 2007, the court made six findings of fact in subproceeding 05-03 that are material to this subproceeding because they confirm as matters of fact that Suquamish fished in the case area at treaty time. Tulalip did not appeal these finding, so they are final and binding on Tulalip. These findings are:

1. "In the section of her report devoted to fisheries, Dr. Lane stated that the Suquamish fished for fall and winter salmon at the mouths of the Duwamish and Snohomish Rivers, and in the 'adjacent marine area." Order on Motions for Summary Judgment, dated January 29 2007, Dkt. 200-4/187, at 10:12-14.

2. "The Fort Langley journal documents that the Suquamish did travel to the Fraser River. It is my opinion that the Suquamish undoubtedly would have fished the marine waters along the way as they travelled. It is likely that one of the reasons for travel was to harvest fish. The Suquamish travelled to Whidbey Island to fish and undoubtedly used other marine areas as well." *Id*. at 10:19-21, quoting Dr. Lane Suquamish Report, p. 16.

3. "In her testimony, Dr. Lane clarified that the places marked on this map, all on the western side of Puget Sound, were sites within Suquamish Territory, and did not indicate other areas where they may have traveled to fish." *Id*. at 11:3-5.

4. "[Dr. Lane's] reference to the Strait of Juan de Fuca, Haro and Rosario Strait places [the Suquamish's] route on the west side of Whidbey Island, from the Port Madison area and up through the San Juan Islands." *Id*. at 12:10-12.

5. ". . .the mouth of the Snohomish River . . . is on the eastern side of Whidbey Island but well south of area at issue [in subproceeding 05-03]." *Id*. at 13:4-5.

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6. ". . . Suquamish fishing in this area was described by Dr. Lane as fall and winter fishing at the mouth of . . . the Snohomish River . . .." *Id*. at 13:7-8.

Based on these and other findings of fact and rulings already in the court record, Suquamish will show below that summary judgment in its favor based on the equitable doctrines of Judicial Estoppel, *Res Judicata* and Laches is warranted.

IV. POINTS AND AUTHORITIES

A. Suquamish Is Entitled to Summary Judgment on the Grounds of Judicial Estoppel, *Res Judicata*, and Laches

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.t Ct. 2548, 91 l. Ed. 2d 265 (1986); *Midmountain Contractors Inc. v. American Safety Indemnity Company et al.*, Slip Copy 2012 WL 3864901 at p. 5 (W.D. Wash. September 5, 2012). The moving party bears the initial burden of showing there is no genuine issue of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323; *Midmountain*, *Id*. If the moving party meets its burden then, to withstand the summary judgment motion, the non-moving party must establish a genuine dispute of material fact regarding an essential element of his case that it must prove at trial. *Id*. Suquamish will establish in the following sections that there is no genuine issue of material fact and it is entitled to summary judgment as a matter of law.

B. The Court Must Apply Judicial Estoppel Against Tulalip As a Matter of Law to Preserve the Integrity of the Judicial Process

The doctrine of judicial estoppel prevents a party from assuming a certain position in one legal proceeding, succeed in its case by maintaining that position and then in a subsequent proceeding assume a contrary position to the prejudice of an opposing party. *New Hampshire v.*

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Maine, 532 U.S. 742, 742-743, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); *Hamilton v. State Farm Fire & Casualty Company*, 270 F.3d 778, 782-783 (9th Cir. 2001). The purpose of judicial estoppel is to protect the integrity of the judicial process. *Id*. Thus, a court may invoke judicial estoppel based on "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d at 782, quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

In addressing judicial estoppel courts generally consider three factors. *Id*. The first factor is whether the party's later position is clearly inconsistent with its earlier position. *Id*. The second is whether the party succeeded in persuading the court to accept its earlier position so that judicial acceptance of the party's subsequent inconsistent position creates a perception that either the first or the second court is misled. *Id*. Finally, whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id*.

If there has ever been a situation where a party is "playing fast and loose" with the court, it is Tulalip in this subproceeding. As this court found previously in this subproceeding:

> "In the initial proceeding on their Request for Determination before Judge Boldt in 1975, the Tulalip Tribe claimed as their usual and accustomed fishing areas "[a]ll marine waters of Puget Sound and of the Strait of Juan de Fuca lying within the territorial limits of the State of Washington," together with "[a]ll marine waters of the State of Washington lying within the lands and waters ceded to the United States of America. . .." *U.S. v. Washington*, 459 F. Supp. at 1058. Significantly absent from this claim is any separate reference to Saratoga Passage, Port Susan, Skagit Bay, or any of the other areas near the Tulalip Indian Reservation which the Tulalip now contend are not within "Puget Sound" as Judge Boldt used that term in describing the Suquamish U & A." Order on Motion to Dismiss, Dkt. 17, p. 4:13-24.

Based on this finding, the court held that the term "all marine waters of Puget Sound" as Tulalip had used the phrase in its 1983 proceeding necessarily included the very areas to the east

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of Whidbey Island which they now seek in this subproceeding to exclude from Suquamish's U & A. *Id*. The court ruled that Tulalip's attempted claim to limit the geographic extent of the term "Puget Sound" in this subproceeding was inconsistent with its 1975 claim and therefore impermissible. *Id.*

A deeper look at the 1983 Tulalip subproceeding shows that Tulalip's attempt to mislead the court is more egregious than just trying to define the term "marine waters of Puget Sound" more strictly against Suquamish than for itself in either 1975 or 1983. Tulalip Submission In Support of Their Petition To Determine Usual and Accustomed Fishing Places (Dkt. 8486), Additional Tulalip Submission In Support of Their Petition To Determine Usual and Accustomed Fishing Places (Dkt. 8601a), Tulalip's Pre-Trial Brief (Dkt. 8902) and Tulalip's Written Closing Arguments (Dkt. 9863) establish the extent to which Tulalip relied on the 1975 Suquamish U & A subproceeding in proving its own case in 1983, and also how their evidence more often than not supports Suquamish's fishing and travelling in the case area in this subproceeding. The significant points from these briefs are as follows:

Key Points in 1982 Tulalip Submission Supporting Their Request, dated July 31, 1982 (also found in Tulalip's Pre-Trial Brief, dated April 13, 1983):

1. The court previously recognized that it is an impossible evidentiary task to compile a full inventory of any tribe's usual and accustomed grounds and stations and, as a result, does not follow stringent proof standards (p. 6);

2. In some of the determinations made prior to the date of Tulalip's filing, specifically findings for Lower Elwha, Port Gamble, Lummi, **Suquamish** and Swinomish, the court recognized tribal rights in very broad amounts of territory and these determinations established "de facto standards for evaluating each tribe's evidence on record." (p. 7); (Bolding added)

3. The standard for determining Tulalip's U & A in 1983 must be consistent with determinations made by the court prior to Tulalip's filing, otherwise Tulalip would be unfairly penalized. (p. 7);

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4. The Court's task was particularly difficult when determining U & A for marine areas for two reasons: the range of Indians using the Puget Sound to fish was relatively broad and the identity and present division of tribal groups is somewhat arbitrary. (p.7-8)

5. Indian fishing practices at treaty time were "largely unrestricted in geographic scope." (p. 8, quoting Judge Boldt's FF12 at 384 F. Supp. at 353).

6. Indian fishing on the Sound was characterized by the absence of strict territoriality among the Indians at and before treaty times. (p.8);

7. The **Suquamish**, Snohomish and Duwamish together comprised an "ecological" unit of "Central Sound" people. (citing to Marian Smith) (p.8); Further, of the three "Central Sound" peoples, "the Duwamish have been accorded virtually no rights, the Suquamish have been accorded rights in a huge area, while the Snohomish (through the Tulalips as successors-in-interest) operate in an artificially diminished marine zone. (p. 9, 11)(Bolding added).

8. The Snohomish "were said to be friends of the Skagits, **Suquamish**, Duwamish, Klikitat, Skykomish, Lummi, Klallam, and Nisqually. (p 8 – 9) (Bolding added).

9. Point Wells in the Edmonds/Richmond Beach area was an area where "Snohomish, the Duwamish, Snoqualmie and **Suquamish** were mentioned as possible joint users before and during treaty times. (p.12)(Bolding added).

10. Port Susan and the adjoining marine area were a non-exclusive usual and accustomed fishing place that was an open, joint use area before and during treaty times. (p. 14-15);

11. Warm Beach just south of the mouth of the Stillaguamish River was very popular and very much utilized before and during treaty times . . . people from the Snohomish area went there and used it and certain people from the Stillaguamish River and the same thing is true between the delta of the Skagit River and the Snohomish River, that the people from the Skagit used it, people from Whidbey Island and people from the Stillaguamish River. (p.15).

<u>Key Points in 1982 Additional Tulalip Submission Supporting Their Request, dated October 12, 1982:</u>

1. Testimony of Mr. Tweddell before the Indian Claims Commission "that the Snohomish used land outside of their claimed areas, that the Snoqualmie, Duwamish and **Suquamish** probably clammed at Edmonds . . . . I actually do not know who was there. The maps on the ethnographies differ, and I imagine that they differ because they simply did not know. **Some give the Duwamish as occupying the territory south of the**

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Snohomish in this area. One gives the Suquamish. I think that this is Haberlin and Gunther, but I am not certain. One informant told me, **Mrs. William Shelton, told me that from Richmond Beach on south it was the Suquamish people were there, and she defined that as being "Chief Seattle's Tribe".** And that still leaves the question in doubt as much as it was before because although Chief Seattle was Suquamish, he resided for so long and was so closely identified with the Duwamish also, that it still doesn't clarify the matter. **So that insofar as the neighbors are concerned of this coastal strip on the southern boundary of the Snohomish, we really do not know who was there, whether it was the Suquamish or the Duwamish, but it would one or the other.** One informant was very emphatic that Indian people knew precisely how far their boundaries went. I am not certain how clear that would be." (MAPS.47)(Bolding Added)

2. Further testimony of Mr. Tweddell before the Indian Claims Commission "that the Swinomish, Skykomish, Snoqualmie and others were friends of the Duwamish, **Squamish** and others; that "it is well-known that there was a certain amount of inter-tribal use of the food resources of the Puget Sound area; that Gedney Island was used by the Snohomish, Duwamish and Snoqualmie . . .." (MAPS.47)(Bolding added)

3. Written submission regarding the area south of Mukilteo: "In those areas distant from the villages where there was a sharing of the resources with other Indians from without the area claimed such as at Holmes Harbor (Tr.79; Fdg. 9); on Camano Island north of Camano City (Fdg. 9) and south of Mukilteo (Tr. 198; Fdg. 12) the record does not justify finding the exclusive use and occupancy necessary to include such claimed areas within the aboriginal possession of petitioner's ancestors." (MAPS.48).

<u>Key Evidence and Testimony Tulalip Submitted at Trial</u>

1. Testimony of Sally Snyder before the Indian Claims Commission: "By the Court: Q. Do you claim for the Plaintiff then just the shore lines, the eastern shoreline of Whidbey Island? A. Yes. Q. Open water? A. No. No. those open waters were used by all groups***." (p.6, Exhibit T-M-10).

2. Testimony of Dr. Carroll Riley: "Deception Pass and Canoe Pass obviously constituted a principal thoroughfare of canoe traffic through the whole north Sound area, since the alternate waterways available would be many miles around the south end of Whidbey Island or the north end of Fidalgo Island." and "The canoe traffic between the upper and lower regions of the Sound would pass through Saratoga Passage on the west, and Port Susan on the east, around Camano Island." (p.15) (Exhibit T-M-10).

3. Testimony of Dr. Barbara Lane dated July 30, 1975 by Tulalip's attorney Mr. Bell: Q. And speaking of 'adjacent marine areas', is it not proper for me to say they [Tulalip predecessors] fished in Holmes Harbor, Saratoga Passage, and Possession Sound and

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Port Gardner Bay and Port Susan and then along Admiralty Inlet on the western shores of Whidbey Island, at least half way up? A. I think that is probably very likely. At 79-80. (p.16)(Exhibit T-M-10).

4. Testimony of Dr. June M. Collins, no identified date: "[Catholic Bishop] Blanchet first went to the village on the western side of Whidbey Island where Tslalakum lived. The priest's account of the next day follows. ". . . then chief Witskalatche arrived with a band of his tribe from another part of the island, and came to shake hands;; chief Netlam soon came also with his bands. ***I became convinced that Netlam and Witskalatche had not done less than Tslalakum with their tribes. . . ." (p. 25-26)(Exhibit T-M-10).[1]

5. Further testimony of Dr. Collins: "In 1841, a missionary, Blanchet, mentioned a Snohomish chief, Witskalatche. According to Riley, the group with this chief 'either lived at, or were camped near enough to Penn Cove [Whidbey Island] to attend Blanchet's missionary services on rather short notice." (p. 26)(T-M-10).

6. Testimony of Cy James: Q. Do you know in what territory the Snohomish or the Snoqualmie would have fished? A. We had territories, each Tribe; from Seattle all the way to the Canadian border, including Duwamish, **Suquamish**, Snohomish, Skagit, Snoqualmie, Lummi, all the way up to some of them Island people. We used to go up there and fish, and there were lots of people out there on them islands; San Juans, Whidbey Island, we fished all over – my grandfather fished all over in there." (p. 30)(Exhibit T-M-10). (Bolding added).

7. That "The nature and extent of fishing by the treaty tribes at treaty time was complex. It cannot be simply explained by reference to written records. . . . The expert testimony showed that such "extra-local" fishing can be analyzed into five distinct types of fishing: (a) fishing in open waters which were not subject to territorial claims, e.g., Admiralty Inlet or the broad open waters of the Straits and the San Juan Islands; (b) fishing while traveling, e.g., fishing with a comb-like net or trolling lines while en route to Fort Victoria, Fort Langley or elsewhere; (c) fishing in areas where there were no host groups, e.g., San Juan Island, Lopez Island or most of the other islands of the San Juan archipelago during the treaty era and the post-treaty decades; (d) kin-based fishing; and (e) invitational fishing. (See especially Snyder testimony at Tr. 612-615). Tulalip Closing Arguments, p. 54-16-55:2.

8. Tulalip further argued that "Indians traveling in canoes using nets or trolling would be such a common activity that it would not be remarked upon by early pioneers and traders and others who left records. River mouth fisheries were, insofar as they were associated with habitations, actually camps in themselves. Marine fishing, on the other hand,

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[1]Blanchet's Journal identifies Tslalakum as a Suquamish Chief who lived on Whidbey Island. T-M-20 at ____.

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would have nothing to do with territoriality or occupation of land. (Tr. 534-35). Tulalip Closing Arguments, p. 55:14-20.

C. Tulalip Boosts its Own Quest to Expand Its Marine U & A By Using Dr. Lane's 1975 Testimony Supporting Suquamish's U & A

In its Closing Arguments, Tulalip stated in its conclusion that "The Tulalip Tribes ask only for equal treatment in this regard, that the open marine areas which were "free access" areas to all tribes during the treaty times be now open to them on the same basis as other tribes." *Id*. at 94; 23-95:1. To this end, Tulalip included a separate section in which it tied Dr. Lane's 1975 hearing testimony in the Suquamish U & A subproceeding and her testimony in the 1983 trial testimony to Tulalip's own quest to expand its marine fishing places. The key arguments Tulalip made were:

1. That Dr. Lane testified that she relies strictly on documents specifically showing regular treaty time fishing or, secondarily, on nineteenth century ethnographic accounts in which fishing is mentioned. She did not find such documentation for other areas for the Tulalip predecessor groups. However, she noted that the lack of documentation for open marine areas was true for other tribes and that should not rule out treaty-time fisheries in such areas." Tulalip Closing Argument p. 9:1-16.

2. That "As to distant locations the Court referred to, it must be noted that the Court did not require that travel or presence at a location must be proven to have been solely or even primarily or the purpose of fishing. All that is required is that members of the tribe customarily fished there; it is irrelevant whether their customary presence at a location might be explained as visiting, trading , digging clams, or whatever, so long as the evidence shows that while they were there, or while en route, they fished." Tulalip Closing Argument p. 10:15-23.

3. That ". . . the Court has recognized that it is an impossible evidentiary task to compile a full inventory of any tribe's usual and accustomed grounds and stations. 384 F. Supp. at 353 (FF13). As a result, the Court does not follow stringent proof standards; to do so, the Court has stated, would probably preclude a finding of any such fishing areas. 459 F. Supp. at 1059. Argument, p. 11:4-11.

4. That "Some of the previous determinations made by the court demonstrate that the tribal groups of Puget Sound utilized broad marine fisheries. See, e.g., the findings for the Lower Elwha, Port Gamble, Lummi, **Suquamish** and Swinomish. . . . The Tulalips

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submit that the standards for determining usual and accustomed fishing places for the tribes should be consistent. The present situation, in which the Tulalips have been confined to the exercise of treaty rights in a relatively small marine area (see attachment E) unfairly penalizes them. This should be apparent from a comparative analysis of the evidence which was offered on behalf of these tribes and the evidence on behalf of Tulalip. Tulalip Closing Arguments, p. 12:2-17. (Bolding added.**)**

5. Although there was documentary evidence that the Suquamish traveled in the marine waters between their home territory and the Fraser River in Canada, Dr. Lane testified in court in that proceeding that there was no specific documentation that the Suquamish fished there. (Dr. Lane testimony, April 9, 1975, at 52). The Court's inclusion of this area within the Suquamish usual and accustomed fishing grounds illustrates the standards employed, of necessity, in adjudicating nineteen century Indian fishing grounds in marine waters. Tulalip Closing Arguments, p. 13:7-16.

6. That the record clearly shows that the evidence presented in the Suquamish case was vigorously contested by the defendant State of Washington. The State of Washington objected to the area requested by the Suquamish Tribe (Tr. Of April 9, 1975, p. 45; Tr. April 10, 1975, pp. 40-44). Further the State vigorously contested the evidence put forward by the Suquamish Tribe as seen by its hostile cross-examination of Dr. Lane. See transcript of April 9, 1975, at pp. 53-59. Thus, we think it clear that the Suquamish ruling provides guidance for this determination. Tulalip Closing Arguments, p. 14:6-17.

7. Dr. Lane acknowledged that the Court has "used a more liberal definition of usual and accustomed places than she does." Tulalip also said that although Dr. Lane interviewed tribal elders to give her leads in her documentary research, she "relies on the documentary record primarily, and the ethnographic records, in addition, to define those areas which were being used by any particular group in the mid-nineteenth century." Tulalip emphasized Dr. Lane's opinion that "the absence of direct written evidence does not negate the treaty-time existence of tribal fisheries." Tulalip Closing Arguments, 15:23 – 16:13.

8. "Some of the documents specifically show their fishing activity, while others recorded only their presence." In a footnote to that sentence Tulalip added "If one must determine where the group of Indians fished, one must know where the group was reported to have frequented. The primary purpose of particular trips might have been fishing or trading, although conclusions regarding the motives for any particular trip would depend upon the circumstances and would be difficult in any case. See Dr. Lane's testimony at Tr. 673-74. As Dr. Lane noted, the Snohomish fished when they traveled any distance, **as did the Suquamish** and other groups whose travels to Ft. Langley on the Fraser River and other locations is recorded. (Tr. 645-46). Dr. Snyder agreed that the Snohomish and other Puget Sound Indians fished while traveling. (Tr. 562)." Tulalip Closing Arguments, 19:5-7 and fn. 5 at 19. (Bolding added)

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9. "Of primary importance is the concept of fishing in 'open marine waters.' That is, fishing in those areas commonly used by many tribes and belonging to no one tribe. Dr. Lane testified that documentary evidence of marine fishing in the Strait of Juan de Fuca or in Puget Sound, in terms of direct evidence, is "extremely fragmentary" and any documentary mention would be only a rare occasion. (Tr. 646-47). There would be very little evidence of any tribe fishing in open marine waters that were too far away from islands or shore to place accurately. Dr. Snyder agreed. The written records very seldom refer to marine fisheries or offshore fisheries". Tulalip Closing Arguments, p. 55:4-14.

10. "However, there is generally no direct documentary evidence showing that specific tribes fished in specific marine areas. Thus, although the Court has held that the Suquamish have usual and accustomed fisheries in Area 7A (north of the San Juans to the Canadian Border), Dr. Lane testified that there is no evidence of Suquamish fishing, say, in the middle of Area 7A. And while the Court has held that the Lummi Tribe has historic fishing in Area 6, there is no evidence of a Lummi fishing site in that area. (Tr. 702-03). In other words, there is no evidence of any tribe having specific fishing places in open marine waters other than special areas such as specific reefnet sites or halibut bank sites. (Id.) Rather, many tribes travelled and fished in those areas. This is particularly important here. For Tulalip travel and presence in many open marine areas contested by Lummis, is, in fact, quite well documented. Tulalip Closing Arguments, 56:7-21.

11. Tulalip further argued that "Indians travel routes typically hug the shore and seldom went from headland to headland. (Trb. 584-86)[.] Even the Canadian raiders in large ocean canoes generally stayed close to shore in their travels. (Id.). In other words, Indians would have used sheltered bays and inlets as they traveled the marine waters of the Puget Sound. That is why Dr. Lane on several occasions testified that when it came to marine U & A she could only talk about marine systems and not about specific fishing points. Tulalip Closing Arguments 58:20-23.

12. To support their own arguments for obtaining a very large marine U & A in Puget Sound, Tulalip argued that ". . . it is not possible or required that specific evidence concerning precise locations be given to establish a general marine area as a usual and accustomed fishing place." Tulalip Closing Argument, 64: 16-19. Tulalip admitted there is only "spotty direct evidence of Tulalip fishing, however, Tulalip asserts there is considerable evidence of regular presence and travel and it argues that "The nature and extent of this evidence is consistent with the findings concerning other tribes and the testimony given by the expert witnesses in this case." Id. at 64:19-24. As a primary example of its argument, Tulalip highlights that "Thus, the Suquamish were granted usual and accustomed fishing rights in open marine waters between their home territory on[sic] the Fraser River in Canada based primarily on travel even though there was no

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specific documentation that the Suquamish fished there (see Testimony of Dr. Lane, April 9, 1975 at 52). Tulalip Closing Argument, 64:25 – 65:6.

Other Relevant Trial Evidence Highlighted in Tulalip's Closing Arguments

1. That John Work's Journal (1824) was a significant record of proof of the geographic area of its U & A "because the record shows that they [Hudson Bay Company] employed Snohomish Indians to guide them from Ft. Nisqually, at the southern reaches of Puget Sound, north along the eastern channels of Puget Sound . . . [to] the future site of Ft. Langley. Tulalip Closing Arguments, 20:10-14.[2]

2. That the evidence of Snohomish presence in various locations in Puget Sound found in the John Work's Journal was sufficient under the 1975 Suquamish U & A standard to establish Tulalip U & A in all of the marine areas along the eastern channels of Puget Sound. Tulalip Closing Arguments, 20:3-11.

3. Tulalip further argued "It was in open marine waters that much of the fishing took place as tribes traveled from place to place on visitations or trading or gathering expeditions. It is not possible, of course, to place this kind of fishing with direct place names or with direct evidence as to specific places. By its very nature, such fishing, while taking place on a regular basis and at usual and accustomed general areas, does not lend itself to precise location. Tulalip Closing Arguments, 56:23 – 57:6.

4. Tulalip added "In addition to trading with Hudson's Bay traders and others, another primary motive for traveling was fishing, particularly traveling to the San Juan Islands to harvest fish and to add to the winter stores." (Snyder Testimony at Tr. 471). To further support this concept of fishing while traveling, Tulalip argued that "Dr. Snyder testified that if a trip was long enough, the Indian travelers would fish. If a trip lasted over night, they would fish (Tr. 562). They would fish in order to have something to eat the next day. This would have been necessary particularly during late January, all of February, and most of March, because at that time, the winter stores would be low if not totally depleted. (Id.). During these times, Indians usually were living on a subsistence level from day to day, and people traveling would be doing the same thing. (Tr. 563)[.] This would be a slack season from the end or near the end of the spirit power-dancing season and the first appearance of spring salmon in March." Tulalip Closing Arguments, 57:21-58:19.

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[2] The entire John Works Journal was admitted into evidence at Tulalip's 1983 trial. This Journal contains numerous references to Suquamish Indians regularly guiding Hudson Bay Company personnel from Fort Nisqually to Fort Langley on the Fraser River.

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5. In specifically illustrating what the Tulalip called "No-Host Fishing" (fishing in areas depopulated as a result of inter-tribal wars or diseases introduced by whites), Tulalip asserted that Tribes from central and northern Puget Sound, possibly including Suquamish since Dr. Snyder testified that "they are considered a wideranging group", would, as a mixture of tribal groups, spend a few weeks at a time in the summer, harvesting fish to add to their winter stores. Tulalip's Closing Argument 61:3- 62:24. These visits would last at least two weeks as the tribes would butcher and process fish at camps right on the beaches. Tulalip Closing Arguments, 59:3 – 62:11.

These excerpts make it abundantly clear that Tulalip relied heavily on the Suquamish 1975 U & A proceeding and standard of proof developed therein to successfully convince Judge Craig to judge Tulalip's evidence in the same manner as Judge Boldt judged Suquamish's limited evidence.

Yet, in this subproceeding Tulalip argues for a much more stringent standard of proof, requiring direct or indirect evidence that Suquamish fished in each inlet, bay or sound in the case area. Tulalip's new position is diametrically opposite to and inconsistent with the evidence submitted and the arguments it used in its own 1975 and 1983 U & A proceedings that successfully netted Tulalip a tremendous expansion of its fishing grounds.

Either Tulalip misled Judge Craig in 1983 or Tulalip is misleading the court now. In either case, judicial estoppel exists to prevent this impermissible change in position to Suquamish's detriment.

Judge Craig's Order expanding Tulalip's U & A as against Lummi shows Tulalip succeeded in convincing Judge Craig to use a more lax standard of proof that it claimed was the standard Judge Boldt established in the 1975 Suquamish U & A proceeding. Judge Craig made the following findings of fact which then enabled Tulalip to greatly expand its marine fishing places:

1. There is very little treaty-time documentation or direct evidence or [sic] fishing in open marine areas, and such occasional references as exist are extremely fragmentary and just happenstance. 626 F. Supp. 1404, 1528, FF. 368. Judge Craig specifically cites Dr. Lane's April 9, 1975, p. 49-50 to support this finding.

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2. It is only by chance that documents dating from treaty time note the presence of specific Indians at a given freshwater site. 626 F. Supp. 1404, 1528, FF. 368. Judge Craig specifically cites Dr. Lane's April 9, 1975, hearing testimony to support this finding.

3. The straits and sound were traditional highways used in common by all Indians of the region and most saltwater fisheries traditionally were free access areas. 626 F. Supp. 1404, 1528, FF. 366.

4. Information respecting specific areas of use by particular groups at treaty times is incomplete and sometimes conflicting. 626 F. Supp. 1404, 1529, FF371.

5. It was normal for all of the Indians in western Washington to travel extensively either harvesting resources or vising in-laws because they were intermarried widely among different groups. The widespread intermarriage among the tribes around Puget Sound indicate that travel through its marine waters occurred frequently and on a regular basis. 626 F. Supp. 1404, 1529, FF377. Judge Craig specifically cites Dr. Lane's April 9, 1975, hearing testimony to support this finding.

6. During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages. During the spring, summer and fall, people moved about to fish at more distant fishing grounds. 626 F. Supp. 1404, 1528, FF. 360.

7. Shallow saltwater bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area. This is especially true if shellfish beds were present. 626 F. Supp. 1404, 1528, FF. 362.

8. In the deeper waters of the bays, huge flotillas of canoes gathered to troll for salmon as they converged in the bays just before their entry into the rivers. 626 F. Supp. 1404, 1528, FF362.

9. The deeper saltwater areas, the sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone traveling through such waters. 626 F. Supp. 1404, 1528, FF 363. Judge Craig specifically cites Dr. Lane's April 9, 1975, hearing testimony to support this finding.

10. There are greater difficulties in specifying or delineating marine areas used by one or another Indian group than is the case with river areas. Similarly, it is easier to specify a particular relatively stable location in marine waters, such as reefnet locations or halibut banks, than it is to delineate trolling areas or areas where herring may have been raked. 626 F. Supp. 1404, 1528, FF367. Judge Craig specifically cites Dr. Lane's April 9, 1975, hearing testimony to support this finding.

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11. At treaty time the Snohomish, in common with other shoreline people, were accustomed to traveling widely in their canoes and to harvesting such fish as were accessible to them. While it is not feasible to document the marine fisheries of the Snohomish at treaty times, it is clear that Tulalip predecessors traveled widely and frequently throughout most of the waters of Puget sound, at least those from Seattle northward, as did other Indians of the area. Absence of documentary evidence of traditional fisheries of Tulalip predecessors in open marine waters is similar to that for other tribes. 626 F. Supp. 1404, 1529, FF 372.

D. <u>If Not Judicially Estopped, Tulalip Will Derive an Unfair Advantage From Imposing a More Stringent Proof Standard on Suquamish</u>

The third factor in determining whether to apply judicial estoppel is whether Tulalip would derive an unfair advantage or if Suquamish would suffer an unfair detriment if Tulalip is not estopped. That Tulalip would derive an unfair advantage if not estopped is evident from the pleadings here. Tulalip complains that Suquamish fishing in these marine waters "has resulted in conflicts on the water and management and **allocation problems between tribal fishers**." *<u>Amended Request</u>*, 5: 11-12. (Bolding added). "Allocation problems" is Tulalip's regularly used euphemism for having to share the Tribal quota of fish, shrimp and crab in the case area. Tulalip also asserts that Suquamish fishing in these marine waters "will be disruptive of current patterns of fishing" and "will seriously impact local fishing by The Tulalip Tribes." *<u>Amended Request</u>*, 5:19-22. In other words, Tulalip fishers benefit financially when Suquamish doesn't fish in the case area. As a result, Suquamish fishers have been foreclosed from a livelihood of commercially harvesting fish, shrimp and crab in these resource rich waters. Order on Motion to Dismiss, at 6:9-10. Based on all of the key testimony, documents and arguments discussed above, this court should find and apply judicial estoppel against Tulalip in order to maintain the integrity and dignity of these judicial proceedings and prevent a miscarriage of justice against Suquamish.

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E. *Res Judicata* Bars Tulalip From Claiming That Suquamish U & A Does Not Include the Marine Waters East of Whidbey Island

The doctrine of *res judicata* applies where an earlier suit (1) involved the same claim or cause of action; (2) reached a final judgment on the merits, and (3) involved the same parties. *Owens v. Kaiser Foundation health Plan, Inc.*, 244 F3d 708, 713 (9th Cir. 2001); *Young. v. Wells Fargo Bank, N.A.*, 2012 WL 3780402 (W.D. Wash. Aug 30, 2012). Previously in this subproceeding, in its Order on Motion to Dismiss, this court applied *res judicata* in this case. *United States v. Washington*, Subproceeding 05-04, Order on Motion to Dismiss, dated October 27, 2005, Dkt. 17. Suquamish renews its request for relief based on the doctrine of *res judicata* and now requests that the court grant a summary judgment in favor of Suquamish based on this equitable defense. Suquamish refers to and incorporates here its previous papers filed in support of its assertion that *res judicata* bars Tulalip as a matter of law from further pursuing its suit. *U.S. v. Washington*, Subproceeding 05-04, *Suquamish Tribe's Motion to Dismiss the Tulalip Tribes' Request for Determination and Memorandum in Support of Motion*, Dkts. 18152/9, 18178/13.

The court previously ruled in this subproceeding that *res judicata* applied to Judge Boldt's 1975 rulings on the Suquamish U & A, Judge Craig's 1985 ruling on the Tulalip U & A, and to the 1983 stipulated settlement between the Suquamish and the Tulalip. The court further ruled that the settlement resolved overlapping claims for some of the areas now in dispute and also incorporated it into a judgment which conclusively determined the issues as between these two parties. *U.S. v. Washington*, 626 F. Supp. at 1476-78. The court held that to the extent Tulalip claimed the Suquamish U & A did not include certain areas on either side of Whidbey Island, they could and should have raised that issue and resolved it in the 1975 proceedings

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and/or the 1983 settlement. It would seriously impact the finality of those judgments to allow them to re-open the issue now." *Id*. at 14-26.

This comports with Judge Craig's 1983 orders approving the settlement in which he stated that the settlement agreement between Tulalip and Suquamish "are the product of compromise on all sides and, if this matter were required to be tried to the court, the stipulating parties would make different representations, put on different proof, and urge the court to reach different conclusions." *U.S. v. Washington*, 626 F. Supp. 1405, 1471.

Judge Craig later reiterated that the stipulated settlement between Tulalip and Suquamish concerned "fishing in waters initially claimed by the Tulalip Tribes in this proceeding." *U.S. v. Washington*, 626. F. Supp. 1405, 1531. Judge Craig further ruled that "[p]ursuant to those agreements the stipulating tribes, with a single limited exception, did not participate in the adversarial proceedings of this dispute and thus had no opportunity to present evidence of their own, to cross-examine Tulalip witnesses or to challenge Tulalip evidence. Some of the evidence offered by the Tulalip Tribes dealt with activities, persons or events in areas which are of concern to the stipulating tribes. It should therefore be stressed that the findings of fact and conclusions of law which are adopted in this proceeding are not to be cited or relied upon in any manner against or to the prejudice of the stipulating tribes in this or any other judicial or other proceeding, *provided* that this shall not prevent the independent establishment of the same fact or conclusion in a future proceeding." *United States v. Washington*, 626 F. Supp. 1405, 1530-1531. Based on its prior rulings, the Court should again hold that the MST Settlement Agreement, a settlement between Suquamish and Tulalip which resolved overlapping claims to some of the areas in dispute in this subproceeding, conclusively determined the issues which now, as a matter of *res judicata*, bar Tulalip from challenging Suquamish's U & A here.

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There has been no change in the situation between the parties since 2007 when the court issued its ruling. The appellate court ruled in an appeal from the separate subproceeding 05-03, that having found no evidence in the record before Judge Boldt in 1975 of Suquamish presence in Saratoga Passage or Skagit Bay before or at treaty times, Judge Boldt could not have intended to include these waters in his determination of Suquamish treaty rights. As this court's ruling in this subproceeding on the *res judicata* issue predates the appellate court's ruling in subproceedings 05-03, this court should rule that the appellate ruling did not modify the court's ruling on *res judicata* here.

F. Laches Bars Tulalip From Disputing Geographic Area of Suquamish's U & A Based on Its Interpretation of 1975 and 1985 Suquamish Related Rulings

Laches is an equitable defense that prevents a plaintiff, who with full knowledge of the facts, delays inexcusably or unreasonably in filing suit. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 835 (9th Cir. 2002); *Petrella v. Metro-Goldwyn-Mayer*, 2012 WL 3711706 (9th Cir. Aug 29, 2012). To establish laches a defendant must prove that (1) the plaintiff delayed in initiating the lawsuit; (2) the delay was unreasonable; and (3) the delay resulted in prejudice. *Petrella* at 3.

Previously in this subproceeding, this court applied Laches to Tulalip on the grounds that fifteen years had passed since the Ninth Circuit language provided fuel for the Tulalip "eastern Puget sound" argument and that such delay, as a matter of law, constituted unreasonable delay. *United States v. Washington*, Subproceeding 05-04, Order on Motion to Dismiss, dated October 27, 2005, Dkt. 17. The court held that Suquamish had been prejudiced by this delay in that they had been intimidated from fishing in certain areas, with no judicial resolution of the dispute. *Id*. The same can be said for the fact that for more than 30 years

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Tulalip waited to argue its new interpretation of the 1975 Suquamish U & A determination based on what it is the meaning of the phrase "streams draining into the western side of this portion of Puget Sound".

Suquamish renews its request for relief based on the doctrine of Laches and requests now that the court grant a summary judgment in favor of Suquamish based on this equitable defense. Suquamish refers to and incorporates here its previous memorandum supporting its assertion that Laches bars Tulalip, as a matter of law, from further pursuing its suit. *U.S. v. Washington*, Subproceeding 05-04, *Suquamish Tribe's Motion to Dismiss the Tulalip Tribes' Request for Determination and Memorandum in Support of Motion*, Dkts. 18152/9, 18178/13. The basis upon which the court originally applied the doctrine of Laches against Tulalip in 2005 still applies today. Although court rulings in this subproceeding have been appealed to the Ninth Circuit Court of Appeals twice, the appellate court did not consider or address the issue of Laches, having found grounds to remand the case to this court for determination of whether Tulalip had standing to bring its request.

V. CONCLUSION

For all of the reasons stated above, Respondent Suquamish Tribe respectfully requests that the court grant it summary judgment in its favor and against Petitioner the Tulalip Tribes based on the equitable defenses of Judicial Estoppel, *Res Judicata* and Laches and hold, as a matter of law, that Tulalip is barred from pursuing its claims challenging Suquamish's 1975 adjudicated usual and accustomed fishing places.

DATED this 26th day of October, 2012.

SUQUAMISH TRIBE

/s/ Michelle Hansen
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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered in the CM/ECF system for this matter.

Dated this 26th day of October, 2012.

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