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.	No. C70-9213 Subproceeding 17-1 REPLY TO SKOKOMISH AND SWINOMISH RESPONSES TO MOTION TO DISMISS Oral Argument Requested Note for Calendar: June 30, 2017

I. INTRODUCTION

The Port Gamble S'Klallam and Jamestown S'Klallam Tribes ("S'Klallam") submit this Reply to the Skokomish's and Swinomish's Response to the S'Klallam Motion to Dismiss. (Dkts. 21; 31; 32). The Skokomish included a cross-motion[1] for summary judgment in their response,

[1] Under LCR 7(k), the Skokomish should have sought to consolidate the schedule for the cross-motion with the motion to dismiss and consult with the moving parties beforehand, but they did not do so. LCR 7(k). ("Parties anticipating filing cross motions are encouraged to agree on a

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with a noting date of August 4, 2017. Given there are only four (4) days to reply under the current schedule, the S'Klallam will reserve the option to file a response to the Skokomish's cross motion for summary judgment, but may opt to rest on this Reply.[2] The Swinomish largely (Dkt. 31) concur with the S'Klallam and Squaxin motions, and therefore, this Reply with focus on the Skokomish's Response. (Dkt. 32).

II. REPLY TO SKOKOMISH'S RESPONSE TO MOTION

The Skokomish's Response fails to provide a single persuasive defense to the motion to dismiss brought by the S'Klallam for the four reasons stated below.

A. Summary of Arguments in Support of Motion to Dismiss.

First, the Skokomish did not respond to the judicial estoppel claims and to any of the judicial admissions they made about the extent of their U&A and primary rights. *See*, *e.g.*, Pleadings in Subproceeding 81-1; Request for Determination in Subproceeding 05-2; and Motion for Temporary Restraining Order in Subproceeding 00-1.[3] Second, the Skokomish fail to explain how the Court can properly modify a decree under Paragraph 25(a)(1) through (7) via a request to "confirm" it, and how this confirmation request, made *decade*s after the decision(s) at issue, is not simply a veiled attempt to avoid the requirements of Fed. R. Civ. P. 60(b). Third, the Skokomish

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briefing schedule and to submit it to the court for approval through a stipulation and proposed order.")

[2] If the S'Klallam decide to treat this Reply as a consolidated Reply and Response, as preferred by LCR 7(k), the Court should consider the arguments made herein as direct opposition to the merits of the Skokomish's summary judgment motion, and deny it for the reasons stated herein.

[3] Subproceeding 05-2, Dkt. 18420 (5/02/2006) ("The Skokomish Tribe is limited geographically to its judicially established U&A in Hood Canal only."); Subproceeding 00-1, Dkt. 16757 (8/15/2000) ("The fact is Hood Canal is the Skokomish Tribe's only usual and accustomed area for fishing, including harvesting crab.")

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fail for, at least, the third time to abide by the explicit terms and limits in the Hood Canal Agreement. Fourth, Skokomish's *res judicata* and collateral estoppel arguments are not applicable to a decision that simply does not exist. For any or all of these reasons, the S'Klallam Motion to Dismiss should be granted.

B. The Skokomish Concede That They Are Judicially Estopped.

The S'Klallam and Squaxin motions both allege that the Skokomish are judicially estopped from now claiming that their U&A and primary rights area is "outside Hood Canal" after arguing strenuously for years that their only area is inside Hood Canal. (S'Klallam Motion at 3-4); (Squaxin Motion at 22). In particular, the S'Klallam argued that Skokomish should be judicially estopped from making the current claim that their U&A and primary rights extend beyond Hood Canal:

> Third, and lastly, the Skokomish repeatedly represented to this Court in the primary rights proceeding that they only had rights in Hood Canal, that they are dependent entirely on the use of Hood Canal, that Hood Canal is unique geographically, and that their territory was precisely definable, all of which convinced the court to grant their request.
> ….
> These examples explain why the Skokomish Tribe should be judicially estopped from making an inconsistent claim now.

(*Id*. at 4-5). The Squaxin agree the doctrine is applicable to the facts of this case:

> Under the judicial estoppel doctrine, when a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, it may not thereafter assume a contrary position simply because his interests have changed, especially if it prejudices a party who acquiesced to the position formerly taken by him.

(Dkt. 23 at 22) (*internal citations omitted*). The Skokomish effectively concede these arguments by failing to respond. *See*, *e.g.*, *Nat'l Flood Servs. v. Torrent Techs., Inc.*, 2006 U.S. Dist. LEXIS 34196, at *35, 2006-2 Trade Cas. (CCH) P75,391 (W.D. Wash. May 25, 2006) ("Defendants failed to respond to Plaintiffs' argument. Defendants' failure to respond is considered by the Court as an admission that the argument has merit. See Local Rule CR 7(b)(2)"); *Ardente, Inc. v. Shanley*,

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2010 U.S. Dist. LEXIS 11674, at *20, 2010 WL 546485 (N.D. Cal. Feb. 9, 2010) (silence construed as a concession). At one point, they briefly mention that the "circumstance [their limited U&A area] changed following the trial conducted after the approval of the Hood Canal Agreement." (Skokomish Response at 2). This reason, by itself, warrants a dismissal of this action as an attempt to play fast and loose[4] with the judicial system because it fails entirely to explain the contrary admissions they made in their arguments in Subproceeding 81-1 and Subproceedings 05-1 and 00-1. *See* Rasmussen Decl. at 37-38 (Trial Brief), 62 (RFD), 65, 68 (Memorandum in Support of RFD); Subproceeding 05-2, Dkt. 18420, (5/02/2006) ("The Skokomish Tribe is limited geographically to its judicially established U&A in Hood Canal only"); Subproceeding 00-1, Dkt. 16757, (8/15/2000) ("The fact is Hood Canal is the Skokomish Tribe's only usual and accustomed area for fishing, including harvesting crab.") As described by the Ninth Circuit, these types of statements are also judicial admissions even if the Court does not find grounds for estoppel:

> Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.

American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226, (9th Cir. Nev. 1988) (internal citations omitted). Thus, the "circumstances" cannot change as the Skokomish argued above, and if they did, the Skokomish needed to immediately amend the pleadings, or the prior admissions legally bind them.

C. There Is No Basis to Alter or Amend the Judgment.

There are additional reasons supporting dismissal, namely that there is no jurisdiction for the Court to alter or amend the prior decisions, *United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. Wash. 1985) (primary right decision) and *United States v. Washington*, 384 F. Supp.

[4] *See New Hampshire v. Maine*, 532 U.S. 742, 749-750, 121 S. Ct. 1808 (2001).

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312, 377, (W.D. Wash. 1974) (U&A decision), under Paragraph 25(a)(1) through (7) in the manner pleaded by the Skokomish. The U&A decision[5], in particular Finding of Fact ("FF") 137, cannot be amended or modified, and because it is unambiguous, it cannot be clarified by this Court. (S'Klallam Motion at 17); *see, e.g., Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. Wash. 1998) (ruling that failure to allege ambiguity is the end of the inquiry).

The S'Klallam, Swinomish, and Squaxin agree that the only possible avenue for anything similar to the Skokomish's RFD request would fall squarely under the parameters of Fed. R. Civ. P. 60(b). The Skokomish fail to respond to this argument, and their silence speaks volumes. (S'Klallam Motion at 14:2) ("The only conceivable way one could attempt to obtain such a result is to request such relief using Rule 60(b)."); (Squaxin Motion at 22:4-6) ("What Skokomish actually seeks is for this Court to relieve it from the order in Subproceeding 81-1, which requires a motion under Fed. R. Civ. P. 60(b)."). Swinomish concur, reminding the court of the policy considerations supporting finality inherent in this analysis:

> There is no ground here - there can be no ground - to expand the Skokomish fishery via this thinly veiled collateral attack on the judgment in Subp. 81-1.

(Swinomish Response 4). This Court should, therefore, find that the Skokomish has not properly pleaded their request for relief here by couching a request for modification of a judgement as a mere "clarification" to avoid applying the correct standards for whether grounds exist for such extraordinary relief.

[5] The U&A decision, FF 137, held that "[t]he usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself." *United States v. Washington*, 384 F. Supp. at 377.

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D. Skokomish's U&A Is Not Outside Hood Canal.

The Skokomish U&A decision is crystal clear with FF 137 stating:

> 137. The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself.

United States v. Washington, 384 F. Supp. at 377. The decision awarding Skokomish primary rights is also clear:

> (1). The Skokomish Indian Tribe holds the primary right to take fish in Hood Canal and on all rivers and streams draining into Hood Canal south of the line displayed on Exhibit A [SEE EXHIBIT A IN ORIGINAL] (attached to Special Master's Report and Recommendation, etc. . .) commencing on the west shore of Hood Canal at Termination Point and following the course of the Hood Canal Floating Bridge to the east shore of the canal.

United States v. Washington, 626 F. Supp. 1405, 1486-1487, (W.D. Wash. 1984). Exhibit A, referenced above, attached to the Special Master's Report, is found attached to the Skokomish RFD at 46. Further, the map at Exhibit A, clearly does not depict waters *beyond* Hood Canal.

The Skokomish are arguing, without grounds, that the original decisions (U&A and primary right, cited above) as well as the 1982 settlement of that primary right claim with the S'Klallam, resulted in a "specifically determined" U&A and final primary right agreement, which nevertheless should now be retroactively modified and expanded. (Skokomish RFD ¶¶ 1.1, 1.3, 3.4, 3.8, Dkt. 1); (Skokomish Response at 1). As will be shown below, these empty assertions do not stand up to any real examination.

In stating their case, the Skokomish rely on one piece of evidence, among many, and fail entirely to respond to the S'Klallam argument that there were in fact competing positions from their own experts. (Skokomish Response at 4); (S'Klallam Motion at 19:5-11). In fact, none of

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the testifying experts reiterated Gibbs's assertion of a larger Skokomish exclusive *territory*; instead, their own experts argued that Skokomish territory mirrored or hugged[6] Hood Canal:

> Overall, the testimony emphasized that "geographical factors made it quite easy to see a key area, a consistent area of streams of salt water and of inland tracts which all center on the Canal itself." *Id*. at 47 (Trial Br.) (quoting Dr. Elmendorf.)

Rasmussen Decl. at 47. Dr. Lane concurred. *Id*. at 43 (Dr. Lane describing Skokomish territory as Hood Canal in her testimony). Dr. Elmendorf's deposition testimony was that Twana territory "encompassed 'the drainage area of Hood Canal.'" Rasmussen Decl. at 45 (Trial Br.). Further, Dr. Elmendorf, the Skokomish's own expert, also testified that his opinion about the territory was precise and that the Skokomish territory included only the Hood Canal drainage area:

> It probably was a little more precisely definable aboriginally because of the geographic circumstances. . . . [O]ne could easily define a drainage area which appears to coincide with the area used customarily by the Twana.

Id. at 47. The court, in the end, agreed with the experts that the territory *beyond* Hood Canal was not precisely defined, but did agree that the "drainage basin" was Twana territory:

> By contrast, the boundaries of Twana territory at the crest of the drainage basin were not precisely defined, although the drainage basin as a whole was considered Twana country . . .

United States v. Washington, 626 F. Supp. at 1490. The Skokomish now disagree the boundaries at the "crest" of the area were not "defined" and argue that their entire exclusive territory must be the larger area described by Gibbs. One piece of evidence does not override the Court's two decisions (U&A and primary right). This is a fact which Skokomish admits by arguing that the "Special Master did not base his findings exclusively on any single document," and relied also on the "testimony of witnesses at trial," which included their own experts cited above. (Skokomish

[6] Rasmussen Decl. at 40 (Trial Br.).

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Response at 3:15-19). Therefore, the court *confirmed* that no single document or description was basis for its decision. (RFD, Dkt. 1 at 31) (Special Master's Order) (noting the court considered testimony, evidence, and arguments). This fact, and the fact that Gibbs' description, cited at FF 353, came over a 100 years ago and since that time, numerous judicial determinations created a primary rights' standard, casts further doubt on the Skokomish's interpretation of the meaning of one statement. Four factors were named as persuasive to the recognition of a primary right and these factors were first described in *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1143, (9th Cir. Wash. 1981); they could not have been known to Gibbs. This means that it is, at best, unknown whether Gibbs' 1854-55 description, cited in FF 353, used the term *territory* in the same way as Dr. Lane.[7] *See United States v. Washington*, 626 F. Supp. at 1489, FF 353; *Lower Elwha Tribe*, 642 F.2d 1141, 1143. Presumably that was the reason experts were called to testify on this very issue. The S'Klallam strongly doubt that Gibbs'1854-55 description of Skokomish territory was intended or did convey the pure exclusivity of that area to Skokomish, as required by the court in *Lower Elwha Tribe*. The courts own statement above that boundaries were less precise as one travelled further away from Hood Canal, supports this doubt.

In addition, the language of the Treaty of Point No Point, 12 Stat. 933 (1855), essentially confirms that Gibbs was speaking more generally. The territory described by Gibbs (who was the negotiator of the Treaty) is, significantly, not described in the Treaty as belonging *exclusively* to the Skokomish; quite the contrary. The Treaty of Point No Point described the entire claimed area

[7] *Lower Elwha* held that "Dr. Lane amplified this [primary right] principle by identifying four specific factors to be considered in determining whether a tribe legitimately controlled an area: (1) proximity of the area to tribal population centers, (2) frequency of use and relative importance to the tribe, (3) contemporary conceptions of control or territory, and (4) evidence of behavior consistent with control."

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as part of the ceded territory for *all of the signatory Tribes*, including the S'Klallam. The Skokomish, in cherry picking one piece of evidence from Gibbs' description, ignore the plain language of Article I of the Treaty of Point No Point and its context, which found that all "tribes and bands" had "occupied" the lands it described:

> The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz….

12 Stat. 933. The S'Klallam were supposed to relocate to the head of Hood Canal. Article II of the Treaty provided as follows:

> There is, however, reserved for the present use and occupation of the *said tribes* and bands the following tract of land, viz: The amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal….

12 Stat. 933 (emphasis added). The Skokomish's claims regarding the Treaty's meaning begs the very question: if the S'Klallam were supposed to live with the Skokomish, per the Treaty, how is it possible the Treaty itself *confirmed* the Skokomish's exclusive right to the very area intended to be and described as occupied by all *"said tribes,"* a.k.a. the Point No Point Tribes? The answer is that the Treaty was a description of territory ceded by *all* signatory Tribes and likely never intended to be used as evidence of one Tribe's exclusive territory.

To conclude, the Skokomish do not explain how they are to be excused from the specific and unambiguous ruling that their *U&A* is in Hood Canal and its drainage, regardless of any single quote cited in the *primary right* case. *See supra*, p. 6. The territory described as 'Hood Canal and its drainage' is the U&A Skokomish have abided by since 1974 and which they have repeatedly adopted in this and several other cases.

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E. The Hood Canal Agreement Precludes the Relief Requested.

Another major problem with this RFD is that it seeks to undermine the Hood Canal Agreement by forcing the S'Klallam into a case about the Skokomish's primary right when that right was settled in 1982, and it was supposed to never be litigated again. The Skokomish are tellingly silent in response to the argument that the Hood Canal Agreement precludes the Skokomish from asserting or claiming to have a right broader than the geographic description of the right described in the Hood Canal Agreement. Rasmussen Decl. at 5-15. The Agreement specified that the geographic scope of the stipulation applies to the "Hood Canal fishery" and *defines* the area as "all waters south of a line drawn between Foulweather Bluff and Olele Point . . . ." *Id*. at 10. The Skokomish admit the limitation exists. (Skokomish Response at 2:13-17). The Agreement, according to the Skokomish's adopting resolution, settled "the disputes concerning the Skokomish primary right . . . ." Rasmussen Decl. at 17 (Skokomish Resolution #82-47). Yet here we are again with another dispute concerning that right. It is preposterous to now claim the geographic limit to Hood Canal and its drainage is not applicable or that settling the primary right is not final or can be expanded thirty years later. The Skokomish have no defense, except to dismissively argue that the Agreement resolved only "a portion of the dispute" and that it was intended to "confirm and preserve the pre-treaty historical relationship" but that "[h]ow this relationship was to be reserved remains disputed." (Skokomish Response at 10:1-2). This is vague and not responsive.

Skokomish also argues the Agreement did not preclude an expanded U&A claim, which is irrelevant. In the Primary Right case, U&A was not at issue, full stop. The court's *Order of Reference* to the Magistrate was expressly amended to address primary rights and not U&A. (Skokomish Response at 10:1-4.); (Exhibit 9 to the Declaration of Kevin Lyon, Dkt. 23-3 at 7).

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One reason the Skokomish survived the Suquamish's motion to dismiss in Subproceeding 81-1, was that it was a primary right claim and not U&A[8], and therefore, the court reasoned it was not a re-adjudication of any precedent. Rasmussen Decl. at 31.[9] This is at least the third time the S'Klallam have had to file pleadings to remind the Skokomish that the Hood Canal Agreement and its terms are, in fact, binding. *See United States v. Washington*, 393 F. Supp. 2d 1089, 1096, (W.D. Wash. 2005) (The Skokomish Tribe is enjoined from "other actions in violation of the Hood Canal Agreement"). The S'Klallam simply cannot be required to head to court with such frequency to defend the terms of the Agreement. [10]

F. A Decision Not Entered Cannot Create *Res Judicata*.

Dismissal may be based on the lack of a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). Here, the Skokomish assert that *res judicata* and collateral estoppel, act as "affirmative defenses" that prevent any "challenge of these prior adjudications." (RFD ¶ 3.15); *see also* (Skokomish Response at 15-16). Yet, inconsistently, the

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[8] The Skokomish also ignore that the court in ruling on the Suquamish Tribe's motion to dismiss, expressly noted that the reason the primary right claim was not barred by *res judicata* was that it was not another U&A claim. (Rasmussen Decl. at 28) ("Neither of the [U&A] findings established the primacy of the fishing rights of the Skokomish and Suquamish ….").

[9] The court is focused on the Suquamish U&A versus the primary right claim, but implicit in the reasoning is the court's clear assertion that the case involves primary rights and not U&A.

[10] Most recently, in the case of *Skokomish v. Forsman*, cited by the Skokomish at p. 20, the S'Klallam had to appear as *amici* to reiterate the terms of the Hood Canal Agreement that prohibit the Skokomish in this Court or any other court from asserting a right to exclude the S'Klallam "under any condition or any reason whatsoever." 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. Mar. 23, 2017); S'Klallam Reply, Dkt. 20-2, at p. 9 ("But Skokomish fails to mention the obligation Skokomish has with respect to those findings which were expressly stipulated in exchange for a promise never to use the primary right in a manner that could harm the S'Klallam rights. See *U.S. v. Washington*, 626 F. Supp. at 1469.")

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Skokomish ask this Court to order a judicial confirmation that instructs the parties to interpret a prior order in the way they want. (Dkt. 32-1, Proposed Order). If the original order actually said what the Skokomish interpret it as saying, then the Skokomish do not need a *new* order from this Court.[11] The Skokomish's arguments are posited as conclusions or results that they seek to achieve, rather than an attempt to assert facts and evidence that provide the elements necessary to *expand* the decree in the manner they want. Conclusions, couched as allegations, are not entitled to the standard deference under a motion to dismiss and must not be taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1950 (2009). Dismissal is both just and warranted.

G. Skokomish Should Not Play Fast and Loose About Their Goals.

In addition, the true aim of this case is described in a manner the S'Klallam fear may be misleading to other Tribes and this Court, risking the integrity of the system. The Skokomish claim that their RFD is merely for a subsistence and ceremonial fishery in the "west branch of Satsop." (Skokomish Response at 4:22; 17:17-18). But due to Skokomish's aggressive tactics and representations in other forums, this is potentially hugely misleading. For example, in the *Skokomish v. Forsman*[12] case, Skokomish asked for confirmation of an alleged *already adjudicated* right (relying on Gibbs' statement[13]) to control fishing, gathering, *and* hunting so as

[11] The S'Klallam believe the order unambiguously does not extend beyond Hood Canal.

[12] This Court merely needs to examine the Complaint in *Skokomish v. Forsman* to see that there is nothing simple about the Skokomish Tribe's goal here. *See* Skokomish Response at 20 ("This primary right to regulate and prohibit treaty hunting and gathering within Skokomish (or Twana) Territory is supported by: reliable evidence contemporary with the Treaty of Point No Point of January 26, 1855…").

[13] Complaint, *Skokomish v. Forsman et. al.*, 3:16-cv-05639 (W.D. Wash), at Dkt. 1, ¶ 39 (asserting that Magistrate Cooper had found that the territorial description from Gibbs was in fact adjudicated Twana territory).

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to exclude all Tribes, including the S'Klallam, from hunting or gathering within portions of the ceded territory of the Point No Point Treaty. It may be that this is what they are after here. (*Compare* RFD ¶¶ 1.1, 1.3 *and* Dkt. 32-1, Proposed Order § 3) (requesting an order that "[t]he Skokomish Indian Tribe's usual and accustomed fishing area and primary right area include those portions of Skokomish (or Twana Territory lying outside of the Hood Canal Drainage Basin;") *with* Skokomish Response at 20 (citing the Complaint in *Skokomish v. Forsman*). The court in *Forsman* denied their claim holding that "[i]f *U.S. v. Washington* confirmed Skokomish's primary hunting right, the Court should dismiss this action and permit Skokomish to file a subproceeding there." *Forsman*, 2017 U.S. Dist. LEXIS 42730, at 20-21. If this case is their attempt to follow this instruction, the Skokomish should be clear and not mislead.

III. CONCLUSION

The RFD filed by the Skokomish Tribe "fails to state a claim upon which relief can be granted" under Fed. R. Civ. P. 12(b)(6), and the Court lacks jurisdiction under Paragraph 25(a)(1) through (a)(7). The RFD is internally inconsistent and lacks a legal basis for the relief requested. The Court cannot "confirm" a ruling that does not exist, and the RFD should be dismissed with prejudice. The defects alleged cannot be cured.

DATED this 30th day of June, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Reply to Response to Motion to Dismiss using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 30th day of June, 2017,

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