THE HON. RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT TACOMA

CHINOOK INDIAN NATION, an Indian Tribe and as successor-in-interest to The Lower Band of Chinook Indians; **ANTHONY A. JOHNSON**, individually and in his capacity as Chairman of the Chinook Indian Nation; and **CONFEDERATED LOWER CHINOOK TRIBES AND BANDS**, a Washington nonprofit corporation,

Plaintiffs,

v.

RYAN K. ZINKE, in his capacity as Secretary of the U.S. Department of Interior; **U.S. DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; UNITED STATES OF AMERICA**; and **JOHN TAHSUDA**, in his capacity as Acting Assistant Secretary – Indian Affairs,

Defendants.

Case No. 3:17-05668-RBL

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE BY CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON

Noted on Motion Calendar: 8/24/2018

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Statutes, Rules, and Codes

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The Confederated Tribes of the Siletz Indians of Oregon ("Siletz") have moved the court for an order allowing them to intervene in the present case as to Plaintiffs' trust fund claims. The motion should be denied because the Siletz have failed to file the pleading the rule requires and have not satisfied or addressed the relevant legal standards in this circuit.

I. The Applicable Rule

Fed.R.Civ.P. 24 governs intervention of right and permissive intervention. The Siletz mention both in their motion but do not discuss the different relevance of each or apply them to the facts. The rule provides:

> (a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.
>
> (1) In General. On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> (2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental offer or agency to intervene if a party's claim or defense is based on:
>
> (A) a statute or executive order administered by the officer or agency; or
>
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.
>
> (3) Delay or Prejudice. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for

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> intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.
>
> (c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

II. The Siletz Have Failed to File the Required Pleading in Intervention.

Fed.R.Civ.P. 24(c) requires that a motion to intervene "***must*** ... be accompanied by a pleading that sets out the claim or defense for which intervention is sought" (emphasis added). No such pleading accompanies the Siletz's motion.

In narrow circumstances, the Ninth Circuit has declined to impose a "technical application" of Rule 24(c)'s requirement of a pleading. *See, e.g., Smith v. Pangilinan*, 651 F.2d 1320, 1323 (9th Cir. 1989); *Beckman Industries v. Int'l. Ins. Co.*, 966 F.2d 470, 474-75 (9th Cir. 1992); *Bushansky v. Armacost*, 2014 WL 53352555 at *2 (N.D. Calif. 10-17-14) Those cases are distinguishable. In *Smith*, the Attorney General's interest was clear and clearly stated. In *Beckman*, the proposed intervenor sought to modify a protective order in a closed case and did not seek to assert claims or defenses in the action, unlike here. In *Bushansky*, the proposed intervenor sought to assert the same claims in the operative complaint and incorporated that pleading by reference into his motion to intervene. Here, the Siletz have not presented any reason for the Court to relax the Rule 24(c)'s pleading requirement and allow it to delay explaining what claims or defenses it intends to assert.

Plaintiffs have asked the court for declaratory relief on their trust fund claim, as follows:

> A declaration that the Defendants must maintain the entire value of their tribal trust account in trust for the benefit of the Chinook as of the date of the filing of this Complaint, together with interest accrued during the pending litigation.

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FAC, Doc. 24 at 77. One cannot determine from their motion to intervene whether the Siletz support or oppose this request for relief.

- Do they mean to align with Defendant in this action, urging the court to deny the Chinook's request that the trust fund be maintained or that it be maintained for the benefit of the Chinook at all?
- Do they mean to align with Plaintiffs in this action, supporting Plaintiffs' request that the trust fund be maintained?
- Do they claim that the trust funds should now be disbursed to someone? If so, to whom?
- What is the legal basis for their claim? The Constitution? Federal statute? U.S. Treaty? Equity? Does each of the dozens of Indian tribes that have one or more Chinook descendant members have an interest that entitles them to intervene here?

The Siletz motion does not describe any legal claim for relief or set forth its elements. It reveals only that "the Siletz tribe hereby asserts its interests in the judgment fund on behalf of its tribal member descendants of these two tribes." Siletz motion, 5:1-2. What those interests are, or where they line up in this case, the motion does not say.

A pleading in intervention must, under Rule 24(c), "set out the claim or legal defense for which intervention is sought." While that requirement may be relaxed if the motion itself supplies the relevant claim or defense, the Siletz motion does not. It asserts that the Tribe has an interest on behalf of its members, but it neither describes that interest, nor states its position nor offers any legal authority for the Siletz Tribe to represent that claimed interest, whatever it is. Without a pleading describing the Siletz's legal interest and its position on the issues, the Court cannot assess, as required under Fed.R.Civ.P. 24, whether the Siletz have the proper interest, whether the resolution of the trust fund claim is likely, as a practical matter, to impair their ability to protect that interest, or whether any

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of the existing parties adequately represents that interest. Indeed, that is why Rule 24 requires a pleading. Given the uncertain nature of the Siletz's claims, this Court should enforce the provisions of Rule 24(c) and deny the motion to intervene.

III. The Siletz Motion Fails to Meet the Ninth Circuit Test.

The Ninth Circuit Court of Appeals has long applied a four-part test to motions for intervention, which the Siletz motion also does not address. Intervention of right is granted if:

> (1) the motion is timely; (2) the applicant has a "significantly protectable" interest in the property or transaction that is the subject of the action; (3) resolving the action may, as a practical matter, impair or impeded the movant's ability to protect that interest; and (4) the existing parties do not adequately represent that interest. Fed.R.Civ.P. 24(a)(2); *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 817 18 (9th Cir. 2001) (internal quotation marks and citation omitted).

The party seeking to intervene must show that it meets all requirements for intervention. *See U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

A. The motion is not timely.

Timeliness is "the threshold requirement for intervention of right." *U.S. v. Oregon*, 913 F.2d 576, 588 (1990), *cert. denied* by *Makah Indian Tribe v. U.S.*, 501 U.S. 1250 (1991). If the motion to intervene was not timely, the court need not reach any of the remaining elements of Rule 24. *U.S. v. State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996).

In determining whether a motion for intervention is timely, a court considers three factors:

(1) The stage of the proceeding at which the applicant seeks to intervene;

(2) The prejudice to other parties; and

(3) The reason for and length of the delay.

Orange Co. v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied* by *City of Irvine v. Orange Co.*, 480 U.S. 946 (1987).

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In considering these factors, however, the court must bear in mind that "any substantial lapse of time weighs heavily against intervention." *U.S. v. State of Washington, supra*, 86 F.3d at 1503. The issue of timeliness is left to the sound discretion of the court. *NAACP v. New York*, 413 U.S. 345, 366 (1973); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). However, the court cannot base its decision merely on the length of the time the case has been pending, but must consider the circumstances relating to timeliness in the case. *D.C. v. Locke*, 2009 WL 10681122 (N.D. Calif. 7-31-09).

This case has been pending for almost one full year. As set forth in the Declaration of Anthony Johnson ("Johnson Decl."), the Siletz have been well aware of the pendency of the lawsuit and of its claimed interest for that same length of time, but made no effort to intervene until now (Johnson Decl., ¶ 3). The Siletz waited until after the Court denied the Defendants' motion to dismiss and after the Court set a briefing schedule to intervene.

In this case, the Chinook Tribe and the Bands of Indians was adjudicated to be the successor-in-interest to the Clatsop and the Lower Chinook Bands and, more importantly, to those who had claims to the funds established by Congress (the "property" at issue in this lawsuit), as determined by the Indian Claims Commission back in November 1970, Docket No. 234. *See* Johnson Decl., **Ex. E**. Subsequently, in 1982, the Chinook Indian Nation became the successor-in-interest to the Chinook Tribe and Bands of Indians. Johnson Decl., **Ex.** F. There was no issue regarding the Plaintiffs' entitlement to those monies until August 2015 when the Defendants stopped sending statements to the Chinook, and, after inquiry, informed them that because of the failure to obtain federal recognition thirteen years earlier, the funds were no longer held for their benefit.

If the general issue for which the Siletz seek to intervene – their claim to the trust funds awarded to the Chinook -- had been only recently decided, then perhaps the Siletz's motion to intervene would be timely, but it appears the Siletz are asking the Court to

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determine that they – the Siletz Tribe – are the proper successor-in-interest to the funds awarded to the Chinook by the Indian Claims Commission almost half a century ago:

> The Siletz Tribe's justification for this request [for intervention] is that it is a successor in interest to the historical Lower Band of Chinook Indians and the Clatsop Indian Tribe that were the subject of the ICC cases in question and on whose behalf a judgment was awarded therein, and the Siletz Tribe has many enrolled tribal members who are descendants of these historical tribes.

Siletz motion at 3.

Consequently, the issue of timeliness as to the intervention by the Siletz must be considered in the context of the overall delay in making any effort to assert their interests in the earlier ICC proceeding which dates back to at least 1958. *See* Johnson Decl., **Ex. A**. In that regard, it is also important to know that the Siletz Tribe made an independent and successful effort to obtain funds on its own behalf through the Indian Claims Commission with a completely separate docket number (Docket No. 240). Johnson Decl., **Ex. G**. Only now do the Siletz seek – at least apparently – to be some kind of successor-in-interest to the Chinook ICC funds awarded.

The actions of the Siletz, therefore, in not seeking to intervene and to wait for half a century[1] and until a full year had expired after this lawsuit had been initiated despite being well aware that it was being filed and would include a claim to maintain the trust fund, should be considered in determining whether the motion to intervene is timely. So viewed, Plaintiffs submit the Siletz motion to intervene should be denied as untimely.

B. The Siletz make no showing of a "significantly protectable" interest in the Docket No. 234 trust fund.

The Siletz motion asks the Court to assume, without citing any legal authority, that (1) descendants of the Chinook who are members of the Siletz Tribe according to the

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[1] The Docket No. 234 process dates back to before April 1958 when the first Findings of Fact, Opinion, and Interlocutory Order were issued.

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Siletz's own internal definition, have some interest in the Docket No. 234 judgment; and (2) that the Siletz Tribe is entitled to represent that interest.

Further, the Siletz have cited no authority for their assertion that they are entitled to intervene simply on the basis that they have members with Chinook ancestry. In order to be valid, that assumption would have to be based on at least three premises, none of which is shown to be true: (1) the government does not hold the Docket No. 234 trust fund for the benefit of the Chinook Tribe but rather for all individuals with Chinook ancestry, whether members of the Chinook Tribe or not; (2) the Chinook individuals who have "significantly protectable" individual interests in the trust fund are those defined by the Siletz Tribe's own internal ordinance; and (3) the Siletz Tribe is entitled to represent the interests of those individuals with respect to the trust fund. The Siletz motion does not support any of these propositions.

1. The beneficiary of the Docket No. 234 trust fund is the Chinook Tribe, not any individual with Chinook ancestry.

Claims for compensation for the taking of Indian land were brought by and resolved in favor of the tribes or bands, not in favor of any individual. *E.g., Duwamish, Lummi, etc. Tribes v. U.S.*, 79 Ct. Cl. 530 (1934):

> The negotiations culminating in the treaties were conducted with the tribes, and the primary object was to adjust and settle tribal affairs. The dwellings housed the members of the tribe and the treaty dealt with the tribe as such, and in the absence of more positive provisions to the contrary, we think the claims are tribal.

79 Ct. Cl. at 575-76. The Indians Claims Commission claim, Docket No. 234, that gave rise to the trust fund at issue in this case, was captioned in the name of the petitioner "The Chinook Tribe and Bands of Indians," more fully described in the Opinion of the Commission as "the Chinook Tribe of Indians and the subordinate Waukikum, Willopah and the Clatsop bands of said Tribe of Indians." Johnson Decl., **Ex.** B. Though not all of the named bands were found to have capacity to assert claims, the Commission entered an

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Interlocutory Order on April 16, 1958 (Johnson Decl., **Ex. C**), finding that the Chinook and Clatsop tribes had the capacity to present claims for compensation for the taking of their lands as those lands were described in the Commission's findings. The decision addresses the capacity of the tribes as tribes, not of individuals, to assert these claims. The Commissioner's final award of compensation in 1970 was, by its terms, a Final Award to the "Chinook Tribe and Bands of Indians." *See* Johnson Decl., **Ex. E**.[2]

That determination arose out of the confiscation of the historic lands occupied by the Clatsop and Lower Band of Chinook Tribes in what is today Clatsop County, Oregon, and the southwestern corner of the State of Washington. The Siletz Tribe made its own entirely separate, successful claim for an award of funds for seizure of its lands. This was part of an Indian Claims Commission proceeding -- Docket 240 -- addressing compensation for lands located to the south of the lands historically occupied by the Chinook and Clatsop. *See* Johnson Decl., **Ex. G**. Those Indian Claims Commission proceedings and adjudications have been viewed as conclusive by courts dealing with tribal succession issues, dating back to the initial Judge Boldt decision in *U.S. v. Washington*, 384 F. Supp. 312, 366, 379, 400 (1974) (ICC determinations that the Muckleshoot and Upper Skagit Tribes were the successors-in-interest to the rights of separate bands, tribes, and villages who were parties to early treaties were found to be binding). *See also U.S. v. Washington*, 823 F. Supp. 1422, 1448 (1994).

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[2] Moreover, as evident from the Findings of Fact pertaining to the ICC Final Order in Docket No. 234 (Johnson Decl., **Ex. E**), the monies awarded arose out of the terms of the Unratified Treaties with the Clatsop and Lower Band of Chinook negotiated by Anson Dart in 1851. Significantly, the Siletz, Band of Tillamook, and other Oregon coastal tribes that occupied the area south of the Clatsop also negotiated an unratified treaty in 1855 and the value of those lands were the subject of an entirely different proceeding, ICC Docket No. 240.

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Siletz tribal members who have Chinook ancestors are therefore not individual beneficiaries of the trust fund. As individuals, they have no "significantly protectable interest" in the trust fund. Any rights they have are derivative of and can be enforced only by the Chinook. They are not entitled to intervene as individuals.

Further, as a practical matter, there are Chinook descendants who are members of dozens of Pacific Northwest tribes, including the Chehalis, Cowlitz, Duwamish, Grand Ronde, Lummi, Nisqually, Puyallup, Quinault, Samish, Shoalwater Bay, Siletz, Snohomish, Skokomish, Squaxin Island, and Swinomish. Johnson Decl., ¶ 9. If the Siletz's implication that they are proper representatives of the Chinook simply because they have members with Chinook ancestry were true, all of those other Tribes would be potential intervenors in this case. Moreover, because many members of other tribes belong to tribes from whom they are not originally descended, using the Siletz's approach on this motion, most tribes could claim intervenor status in most litigation involving any tribe. *Id.* at ¶ 11. The Siletz, for example, could intervene to assert the interests of their members in any litigation involving any of the following tribes from whom some of their members descend:

(1) Alsea (including Yaquina and Alsea);

(2) Chinook (including upper and lower Chinook, and Clatsop);

(3) Coos (including Hanis and Miluk);

(4) Kalapuya (including Yamhill, Santiam, Yoncalls, Tualatin, Marys River, etc.);

(5) Lower Umpqua, Siuslaw;

(6) Molalla;

(7) Shasta (including Klamath River);

(8) Rogue River (this is a general term that has been applied to Takelma, Shasta, Applegate, Galice Creek, or any of the Lower Rogue Athapascan groups);

(9) Klickitat;

(10) Takelma (including Dagelma, Latgawa, and Cow Creek);

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(11) Tututni (including all southwest Oregon Athapascan Indian groups including Upper Umpqua, Upper Coquille, Euchre Creek, Flores, Creek, Pistol River, Port Orford, Yashute, Mikonotunne, Applegate River, Galice Creek, Chetco, Chasta Costa, Tolowa, Sixes, Naltunnetunne, etc.)

(12) Tillamook, including Siletz, Salmon River, Nestucca, Nehalem, Tillamook Bay, etc.)

Doc. 58-1 at 3 (Siletz Tribal Code, sec. 7.203).

A tribe may have the right to represent the interests of its members *as members of that particular tribe*, not descendants of a band of one tribe who have now identified with another tribe. *See, e.g., U.S. v. Oregon*, 29 F.3d 481, 487 (9th Cir. 1991) (descendants of band of Nez Perce Tribe that withdrew and joined Colville Reservation no longer has Nez Perce treaty rights; rights belong to Tribe, not to component bands individually). However, the Siletz make no showing and cite no authority for their novel proposition that they are entitled to represent their members *as members of another tribe, i.e.,* the Siletz Tribe is entitled to represent their Chinook descendants alleged interests in Chinook tribal claims. Yet, this is what the Siletz are asking this court to grant them here. The Court should decline the invitation. The Siletz have not shown that they have a "significantly protectable" interest in the Chinook judgment in Docket No. 234.

2. The Siletz ordinance does not control who is or is not Chinook.

The Siletz motion to intervene relies on the assertion that those defined as "chinook" by the Siletz's own internal ordinance are entitled to assert interests – or have the Siletz Tribe assert interests on their behalf -- in Chinook legal entitlements. The motion makes no showing as to why this is legally true. The Siletz cannot pass a law that binds the Chinook, or any other tribe. The Siletz have no power to define the rights of anyone – Chinook or not – in Chinook property.

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3. The Siletz Tribe has no right to represent Chinook individuals claiming Chinook property.

As above, the Docket No. 234 trust fund is for the benefit of the Chinook Tribe as a tribe, not for the benefit of individuals with Chinook ancestry who are not part of the Tribe. However, even if those non-tribal members with Chinook ancestry had some claim to individual interests in the Chinook trust fund (Docket No. 234), the Siletz Tribe would not have standing to represent those interests. The Siletz, by their definition, have about 20% members with Chinook blood; the Chinook have 100%. Johnson Decl., ¶ 5. The Siletz Tribe may represent their members who claim interests in Siletz property or choses in action. They, as a tribe, may not assert claims to Chinook property. Following the decision finding the Chinook to be the successor-in-interest to the Clatsop and Lower Band of Chinook and the subsequent Congressional act appropriating funds for the Tribe to implement the ICC decision (*see* 87 Stat. 466 (1973)), those claims are properly asserted only by the Chinook Tribe absent evidence of merger or consolidation with the Siletz, and none has been presented here. "Furthermore, once a group is found to be the successor in interest to a treaty signatory that group's rights under the treaty may be 'lost only by an unequivocal action of Congress.'" *U.S. v. State of Washington,* 823 F. Supp. 1422, 1448 (W.D. Wash. 1994). *See U.S. v. Oregon, supra*; *Confederated Tribes of Chehalis Indian Res. v. Washington*, 96 F.3d 334, 341 (9th Cir. 1996).

C. The Siletz have not shown that resolution of Plaintiffs' trust fund claim may impair or impede their interest.

The Siletz motion argues that "the Siletz Tribe and its descendant members have a legal interest in any claim for distribution of the judgment funds from Docket #234 held in trust by the United States." *Id.* at 6:21-7:1-2. But Plaintiffs' claim is not for "distribution of the judgment funds." It is for "a declaration that the *Defendants must maintain the entire value of their tribal trust account in trust for the benefit of the Chinook.*" FAC, Doc. 24 at 77

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(emphasis added). If, as they claim, the Siletz "have a legal interest in any *claim for distribution* of the judgment funds form docket #234," that interest is not at issue in this case. Plaintiffs have not asked for distribution of the Docket No. 234 trust fund. In the language of Rule 24, disposing of this action, either in favor of Plaintiffs or in favor of Defendants, will not "as a practical matter impair or impede the movant's ability to protect its interest."

D. The Siletz motion fails to show that Defendants do not adequately represent the Siletz interest.

As above, the lack of a Siletz pleading in intervention leaves us to guess what the Siletz claim and with which parties they might have aligned had they filed a pleading. They may oppose the declaratory relief Plaintiffs seek. If so, their interests may well align with those of the Defendants, and they have made no showing that Defendants do not adequately represent those interests.

E. The *LeBeau* comment.

The Siletz motion includes a page and a half of untethered discussion of the idea that, under *LeBeau v. United States*, 474 F.3d 1334 (Fed. Cir. 2007), *individual* lineal descendants have no vested property right in Congressionally appropriated payment for confiscated Indian lands until those amounts are actually distributed. The motion does not explain how this concerns the established elements the Siletz must prove to support intervention. On its merits, *LeBeau* and its progenitors do not apply to the present case because they concern the *allocation to individuals* of an Indian Claims Commission Judgment Fund for Sioux Tribal members under a "Distribution Act" passed by Congress in 1972. The question was whether the 1972 Distribution Act fixed the vested rights of individual tribal members or whether a 1998 Congressional enactment could alter those individuals among tribal members before payment. The *LeBeau* court held that Congress could change the individual allocations among tribal members until payment was actually

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made. 474 F.3d at 1342-43. The case has nothing to do with the vesting of *tribal rights* to adjudicated funds. *LeBeau* holds that Congress can change the allocation of funds appropriated to compensate a tribe to individuals within that tribe. It offers no support to a claim that members of one tribe can gain entitlement to funds appropriated for another tribe of which they are not members.

IV. Conclusion

For the foregoing reasons, the Motion to Intervene of Right by Confederated Tribes of Siletz Indians of Oregon should be **DENIED**.

DATED: August 20, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2018, I served the foregoing **OPPOSITION TO SILETZ'S MOTION TO INTERVENE** on the following individual(s):

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☒ by the Court's CM/ECF system to the email address listed above
☐ by facsimile pursuant to the fax number listed above
☐ by email to the email address listed above
☐ by overnight delivery to the address listed above
☐ by first class mail to the address listed above

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