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Attorneys for the Confederated Tribes and Bands of the Yakama Nation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a sovereign federally recognized Native Nation,

Plaintiff,

v.

KLICKITAT COUNTY, a political subdivision of the State of Washington; KLICKITAT COUNTY SHERIFF'S OFFICE, an agency of Klickitat County; BOB SONGER, in his official capacity; KLICKITAT COUNTY DEPARTMENT OF THE PROSECUTING ATTORNEY, an agency of Klickitat County; DAVID QUESNEL, in his official capacity,

Defendants.

Case No.: 1:17-cv-03192

YAKAMA NATION'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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1. INTRODUCTION

The Yakama Nation and the United States exercise criminal jurisdiction over Yakama Member-offenses committed within the exterior boundaries of the Yakama Reservation, which boundaries remain unchanged since the Treaty with the Yakamas was executed on June 9, 1855, ratified by Congress on March 8, 1859, and proclaimed by President James Buchanan on April 18, 1859. Treaty with the Yakamas, Yakama Nation-U.S., June 9, 1855, 12 Stat. 951. This lawsuit is the result of Klickitat County's past and continued assertion and exercise of *ultra-vires* criminal jurisdiction within these congressionally established Treaty boundaries.

Defendants seek dismissal under Rule 12(b)(6) by fabricating a Catch-22 in which the county cannot be sued for the actions of its departments and the departments cannot be sued separate and apart from the county. Such circular logic employed as a means of securing dismissal under Rule 12(b)(6) is unsupported by any applicable federal or state law.

Defendants also seek dismissal by incorrectly asserting that every local jurisdiction operating on or nearby the Yakama Nation's reservation lands is a necessary party. This is an impermissible attempt to vastly expand the scope of this lawsuit under Rule 12(b)(7) and Rule 19. Defendants are in effect trying to commandeer the Yakama Nation's claims against them based on some speculative

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dystopian future where every local jurisdiction decides to deny the Yakama Nation and the United States' concurrent but exclusive criminal jurisdiction over Yakama Members within the Yakama Reservation, thereby undermining the Yakama Nation's jurisdiction. Simply put, Defendants' arguments under Rule 19 are not supported by federal law, and do not entitle Defendants to dismissal.

For the reasons stated herein, the Yakama Nation respectfully requests that Defendants' Motion to Dismiss For Failure to State a Claim Pursuant to Rule 12(b)(6) and for Failure to Join Indispensable Parties Pursuant to Rule 12(b)(7) be denied in full.[1]

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[1] Defendants' Motion to Dismiss included what appears to be three drawings that feature largely illegible writing. ECF No. 16 at 2:14-4:11. The Defendants failed to explain the drawings' purported content, relevance, origin, or offer any proof of authenticity, and did not provide a legal basis for the introduction of new materials in the context of a Rule 12(b)(6) Motion to Dismiss. *Id*. Plaintiff does not concede the admissibility or relevance of any of these drawings, and reserves its rights to object and move to strike them from the record.

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2. LEGAL ARGUMENT

Defendants' Rule 12(b)(6) arguments appear to actually rely upon Rule 17(b), but under either rule Defendants' Motion should be denied because they failed to meet their burden as the moving party. Under Rule 12(b)(6), Defendants failed to establish that the Yakama Nation's claims are not plausible or unsupported by substantial facts. Under Rule 17(b) Defendants did not prove that Klickitat County, the Klickitat County Sheriff's Office, and the Klickitat County Prosecutor's Office lack capacity to be sued.

Similarly, Defendants' Rule 12(b)(7) Motion to Dismiss should be denied because none of the persons Defendants argue must be included in this litigation are necessary under Rule 19(a)'s three factor analysis, and because Defendants did not offer argument substantiating its claim in the Motion's caption that the suggested persons are indispensable.

2.1 Yakama Nation's Complaint Satisfies the Standard Under Rule 12(b)(6) By Stating Sufficient Facts to Support a Plausible Claim for Relief.

In order to dismiss claims under Rule 12(b)(6), this Court must determine that, taking the factual allegations within the Complaint as true, the Complaint fails to state a plausible claim for relief. Put another way: to survive a motion to dismiss, the Complaint must state a claim to relief that is "plausible" on its face. *Bell*

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Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court's Rule 12(b)(6) analysis will necessarily turn upon the factual factors necessary to establish the Plaintiff's claims for relief. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). The Court must conduct a context-specific analysis when determining whether a complaint states a plausible claim for relief. *Id.* at 679.

This standard imposes a high bar to dismissal because of the early stage of the case and the absence of complete discovery. When ruling on a defendant's motion to dismiss, the Court must assume the truth of all material allegations within the Complaint. *Albright v. Oliver*, 510 U.S. 266, 268 (1994). The Court must also construe the pleadings in the light most favorable to the party opposing the motion. *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). Assuming the truth of the facts as pled, the Court then applies the "plausible claim" standard articulated in *Twombly*. *Iqbal*, 556 U.S. at 678. The standard requires a plaintiff to plead "…factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

At the outset, the Yakama Nation's claim for relief is based on its inherent sovereign and Treaty-reserved rights under the Treaty with the Yakamas of 1855, codified at 12 Stat. 951. *See also* 28 U.S.C. § 1362. Defendants' *ultra-vires* exercise of state jurisdiction infringes upon these Treaty-reserved rights, as well as the

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United States' exercise of jurisdiction. *See, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832). Even concurrent state jurisdiction unduly interferes with Tribal sovereign authority when the state jurisdiction is not exercised pursuant to delegated federal authority. *See, e.g., Williams v. Lee*, 358 U.S. 217, 223 (1959). Within the Yakama Reservation, Klickitat County cannot exercise criminal jurisdiction based upon delegated federal authority due to Washington State's retrocession of jurisdiction to the United States. ECF No. 1 at 7. Therefore, Defendants' assertion and *ultra-vires* exercise of jurisdiction over Yakama Members violates the Yakama Nation's inherent sovereignty, its Treaty-reserved criminal jurisdiction, and federal statutory and common law.

The Yakama Nation has pled sufficient facts to support this claim for relief. In its Complaint, the Yakama Nation alleged facts related to Defendants' arrest, detention, charging, prosecution, and conviction of an enrolled Yakama Member for alleged crimes arising within the exterior boundaries of the Yakama Reservation. ECF No. 1 at 3, 8. In addition, the Yakama Nation alleged that Defendants have expressed their intent to continue such *ultra-vire*s exercises of criminal jurisdiction into the future. ECF No. 1 at 8. These alleged facts, which must be accepted as true for purposes of the Defendants' Motion, demonstrate a plausible claim that the Defendants have violated the Yakama Nation's inherent sovereignty,

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its Treaty-reserved criminal jurisdiction, and federal statutory and common law. Thus, the Yakama Nation has met the standard under Rule 12(b)(6) by alleging facts that show the Defendants have, and will continue to, unlawfully exercise criminal jurisdiction over enrolled Yakama Members within the congressionally established Treaty boundaries of the Yakama Reservation. Defendants' Motion to Dismiss under Rule 12(b)(6) should therefore be denied.

2.1.1 Amendment of the Complaint, Not Dismissal of Claims, is the Appropriate Remedy Should the Court Find that the Complaint Does not Satisfy the Standard Under Rule 12(b)(6).

Should this Court find that the Complaint does not meet the standard in Rule 12(b)(6), the Court should allow Yakama Nation to amend the Complaint accordingly. Claims should not be dismissed under Rule 12(b)(6) unless "…it is clear that the Complaint could not be saved by any amendment." *Robertson v. Dean Witter Reynolds, Inc.*, 745 F.2d 530, 541 (9th Cir. 1984), citing *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). To the extent that this Court rules against the Yakama Nation on Defendants' Rule 12(b)(6) Motion, the Court should allow the Yakama Nation leave to amend the Complaint rather than ordering dismissal.

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2.2 Dismissal of Claims under Rule 17(b) Would be Improper Because Under Washington State Law, Klickitat County, Klickitat County Sheriff's Office, and Klickitat County Department of the Prosecuting Attorney Have the Capacity to be Sued.

While styled as a Rule 12(b)(6) Motion to Dismiss, Defendants' Motion is essentially arguing that three of the Defendants should be dismissed due to a lack of capacity to be sued under Rule 17(b). In short, Defendants argue that (1) the Sheriff's Office and Prosecutor's Office cannot be sued apart from Klickitat County because they are agencies of the county; and (2) Klickitat County cannot be sued because the county has no power over the Sheriff's Office and Prosecutor's Office in criminal arrests and prosecutions. ECF No. 16 at 4-10. The Defendants' circular argument fails under the Rule 17(b) standard and the relevant state law.

2.2.1 Under Rule 17(b), Federal Courts Must Look to State Law to Determine Whether a Party Has Capacity to Be Sued in Federal Court.

A party's capacity to sue or be sued in federal court is addressed by Rule 17(b). For any party that is not a corporation or an individual acting outside of a representative capacity, the party's capacity to be sued is determined by the law of the state where the court is located. Fed. R. Civ. P. 17(b)(3).[2] Because this case

[2] Should the Defendants allege that Klickitat County is a corporation, under Fed. R. Civ. P. 17(b)(2), Washington law would still apply to this Court's analysis.

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was brought in the District Court for the Eastern District of Washington, Defendants' capacity to be sued is determined by Washington State law.

2.2.2 Klickitat County and the Prosecutor's Office Have Capacity to be Sued Under Washington State Law And Are Proper Parties to This Lawsuit.

Suits against Klickitat County are authorized by the Washington State Legislature and recognized by Washington State courts. To determine whether an entity has the capacity to sue or be sued, Washington courts look first to the legislative text establishing an entity. *Roth v. Drainage Improvement Dist. No. 5, of Clark County,* 64 Wn.2d 586, 588 (1964). Under the Revised Code of Washington, counties have "…capacity as bodies corporate, to sue and be sued in the manner prescribed by law…." RCW 36.01.010. In other words, Washington State courts have recognized counties' capacity to sue and be sued under RCW 36.01.010. *See generally Broyles v. Thurston County*, 147 Wn. App. 409, 427-28 (Wash. Ct. App. 2008); *Nolan v. Snohomish County*, 59 Wn. App. 876, 883 (Wash. Ct. App. 1990) (jurisdiction over the county's council was achieved by suing the county).

Contrary to Defendant's argument, Klickitat County's capacity to be sued is not determined by the degree of control that the county exercises over the Sheriff's Office or Prosecutor's Office. Defendants contend that Klickitat County cannot be sued because the Klickitat County Board of County Commissioners exercises a

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narrow legislative authority and cannot control the actions of the prosecutor's office and sheriff's office. ECF No. 16 at 7-10. This argument ignores the clear language of RCW 36.01.010 and the preceding relevant precedent. Klickitat County is a properly named Defendant to this action.

The Klickitat County Department of the Prosecuting Attorney is capable of being sued apart from Klickitat County when the Klickitat County Department of the Prosecuting Attorney is exercising the state's criminal jurisdiction. In other words, counties may not be liable for the actions of a prosecutor's office when it represents the state, such as when prosecuting criminal cases. *Broyles,* 147 Wn. App. at 427-28. It is only when a county prosecutor's office is acting in an *administrative capacity* that the County is the proper party to be sued for the acts or omissions of its prosecutor's office. *Id*.

Defendants argue that Klickitat County cannot control its Department of the Prosecuting Attorney's exercise of criminal jurisdiction. ECF No. 16 at 8-10. This argument actually supports the distinction between that office's administrative and prosecutorial functions. Defendants cannot argue on the one hand that they cannot be sued apart from Klickitat County, and on the other hand that Klickitat County has no control over the Department of the Prosecuting Attorney. The legal distinction for capacity to sue turns on whether the county prosecutor's office is acting in

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an administrative capacity or a prosecutorial capacity. *See Broyles,* 147 Wn. App. at 427-28. Given the prosecutorial nature of some of the actions in dispute in this case, the Klickitat County Department of the Prosecuting Attorney is a properly named Defendant to this action along with all other Defendants.

2.2.3 Klickitat County Sheriff's Office Is Capable of Being Sued In Order to Enforce An Injunction Prohibiting Future Illegal Arrest and Detention of Yakama Nation Members.

By Defendants' own admission, the Klickitat County Board of County Commissioners has no power to limit or control who the Sheriff's Office arrests or detains within Klickitat County. ECF No. 16 at 5, 10. Defendants further argue that an injunction against Klickitat County will not be effective against the Sheriff's Office. ECF No. 16 at 10. The Yakama Nation acknowledges the precedent in both State common law and this Court's previous decision in *Assenberg v. County of Whitman*, 2015 U.S. Dist. LEXIS 118607, 2015 WL 5178032 (Sept. 4, 2015). *See also Tahraoui v. Brown*, 185 Wash. App. 1051 (Wash. Ct. App. 2015). However, if the Sheriff's Office does not have the capacity to be sued, and declaratory or injunctive relief against Klickitat County will not enjoin the Sheriff's Office, the Yakama Nation is left without recourse in preventing the reoccurrence of illegal arrests of Yakama Members.

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2.3 Defendants' Failed to Meet their Burden of Persuasion Under Rule 19 Because the Asserted Necessary and Indispensable Parties are Neither 'Necessary' Nor 'Indispensable.'

Defendants ask the Court to require Rule 19(a) joinder of a long list of officials, none of whom have criminal jurisdiction over Indian offenses committed within the Yakama Reservation's congressionally ratified Treaty boundaries. Because the County failed to establish that these officials or the jurisdictions they represent are necessary parties under Rule 19(a), Klickitat County's 12(b)(7) motion to dismiss for failure to join a party under Rule 19 should be denied.

2.3.1 Under Rule 19, Federal Courts Consider Three Factors When Determining Whether a Person is a Necessary Party.

To successfully move for dismissal for failure to join a party under Rule 19, Defendants must show: (1) an absent party is 'necessary,' (2) joinder of that party is not feasible, and (3) that party is 'indispensable' such that the action cannot continue without that party in "equity and good conscience". *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999).

Rule 19(a) requires that all necessary parties be joined to a lawsuit. Fed. R. Civ. P. 19(a); *Alto v. Black*, 738 F.3d 1111, 1125-26 (9th Cir. 2013). To determine whether a person is a necessary party, the Court considers whether the person fits within any of the three categories of necessary parties detailed in Rule 19(a)(1). Where a person is deemed a necessary party under any one of Rule 19(a)(1)'s three

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factors, outlined below, and is not joined to the lawsuit as required, Fed. R. Civ. P. 19(a)(2) directs the Court to order the necessary party's joinder. The party asserting the necessity of joinder bears the burden of persuasion. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

First, a person is a necessary party if the court cannot provide complete relief among the existing parties in the person's absence. Fed. R. Civ. P. 19(a)(1)(A). When conducting a 'complete relief' analysis, "the court asks whether the absence of the party would preclude the district court from fashioning meaningful relief as between the parties." *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004). This factor is only concerned with relief as between the existing parties, and not between a party and the absent person for whom joinder is sought. *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981). The relevant question for purposes of determining whether complete relief can be granted is, therefore, whether success in the litigation can afford the plaintiff the relief sought against the other existing parties. *Yellowstone Cnty. v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996).

Second, a person must be joined if the person claims an interest in the subject matter of the action and her ability to protect that interest will be impaired

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in her absence. Fed. R. Civ. P. 19(a)(1)(B)(i). The person must actually claim an interest in the subject matter of the lawsuit, rather than having existing parties claim the third party's interests in the third party's absence. *Bowen*, 172 F.3d at 689. An absent person's ability to protect its interests are not impaired where such interests will be adequately represented by existing parties to the dispute. *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999).

Third, where a person claims an interest in the subject matter of the dispute, the person should be joined if litigating the case in her absence would subject the existing parties to multiple or inconsistent obligations. Fed. R. Civ. P. 19(a)(1)(B)(ii). In *Salt River Project Agric. Improvement & Power Dist. v. Lee*, the Ninth Circuit considered whether the Navajo Nation was a necessary party to an action seeking injunctive relief against certain Navajo Nation officials. 672 F.3d 1176, 1181 (9th Cir. 2012). The Plaintiffs argued that unless the Navajo Nation was joined under this third factor of a Rule 19(a) analysis, Plaintiffs may be subject to future litigation (i.e. inconsistent obligations) brought by the Navajo Nation separate and apart from their enjoined officials. *Id.* The Ninth Circuit rejected this argument, reasoning that Plaintiffs brought the lawsuit against specific officials and failed to explain how the Navajo Nation's actions would create inconsistent obligations as between the existing parties. *Id.* The Court further noted that if a

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non-party official were to take actions that violated the injunctions issued in the case, the Plaintiffs were always free to file a separate lawsuit against those officials. *Id*. The situation at bar is analogous to the situation in the *Lee* case insofar as, to the extent any injunction arises from this action that does not expressly bind other parties involved in similar jurisdictional disputes, the Yakama Nation is free to seek relief in the courts if those disputes ripen into real justiciable controversies.

Where a non-party is determined to be necessary under Rule 19(a), and where joinder is not feasible, courts consider whether the party is indispensable under Rule 19(b) such that in equity and good conscience the case should be dismissed, which requires an additional four part analysis. *Makah Indian Tribe*, 910 F.2d at 559-60. Courts weigh (1) the prejudice to the non-parties resulting from a judgment, (2) whether shaping the relief can lessen the resulting prejudice, (3) whether an adequate remedy can be granted in the non-parties' absence, and (4) whether alternative forums are available. *Id.* at 560. However, if a non-party is not determined to be 'necessary' under Rule 19(a), courts do not need to analyze whether the non-party is indispensable under Rule 19(b). *Id*. at 559. As set forth below, Defendants have failed to establish the first threshold for a Rule 19 analysis requiring joinder of purportedly "necessary" parties. Even if Defendants met this

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threshold, however, they have still not met their burden to the extent they seek dismissal of the Yakama Nation's lawsuit under Rule 19(b).

2.3.2 Defendants Failed to Meet their Burden of Persuasion that Other Jurisdictions' Officials are Necessary Parties Under Rule 19(a)'s First and Third Factors.

Using this three-factor Rule 19(a) analysis, Defendants did not meet their burden establishing that any of the fourteen officials named in its Motion are necessary parties. At the outset, Defendants failed to cite Rule 19(a)'s applicable factors or explicitly tie their arguments to these factors, leaving the Yakama Nation to guess at which factors Defendants rely upon in the instant Motion. Based solely on similarities between certain language used by Defendants and Rule 19(a), it seems that Defendants are only arguing under the first (Rule 19(a)(1)(A)) and third (Rule 19(a)(1)(B)(ii)) factors.

Under the first factor, the Court will be able to provide complete relief to the Yakama Nation as between the existing parties to the dispute. Klickitat County is the jurisdiction presently unlawfully asserting and exercising criminal jurisdiction within a specific area of the Yakama Reservation. The County, its relevant Departments, and its relevant Officials have been made parties to this action such that, if successful, the Court will be able to provide the Yakama Nation with the relief sought; i.e., the Yakama Nation seeks to enjoin Klickitat County and its

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agents from unlawfully exercising jurisdiction within the Yakama Reservation. Defendants assert that the Court cannot provide the Yakama Nation with complete relief in the absence of the Yakima County Sheriff and various Washington State officials because an injunction against Defendants would not prohibit other governments from unlawful exercise of criminal jurisdiction within the Yakama Reservation. This is effectively relying on speculation that disputes with different jurisdictions may arise at some point in the future involving jurisdictional tensions between other parties and the Yakama Nation that do not, at present, exist. In short, Rule 19 cannot be a vehicle to force a plaintiff to bring a lawsuit that is not ripe against a non-party. Defendants do not explain how the absence of these non-party officials will preclude the Court from fashioning meaningful relief as between the existing parties. Defendants did not carry their burden of persuasion under Rule 19(a)(1)(A).

Defendants' Rule 12(b)(7) Motion similarly fails under Rule 19(a)'s third factor. Defendants did not assert or provide any evidence that the suggested officials laid claim to an interest in this litigation; presumably because no other party has claimed an interest in this litigation. Even if such claims of interest existed and were offered before the Court, Defendants did not explain why an injunction entered here would not control on issues of enforcement between

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Defendants and their fellow state jurisdictions in the future. Defendants rely heavily on the argument that other jurisdictions will act *ultra vires* and issue warrants for Defendants to execute that would defy this Court's injunction, should the Yakama Nation be successful. But Defendants offer no reasoning for why they would not simply rely on their court-ordered duty to refrain from exercising jurisdiction unlawfully within the Yakama Reservation to avoid further violations at the request of other jurisdictions or state government agencies. Put another way, to the extent this Court issues any injunctive relief, the requests from other parties for the Defendants to violate that court order is not a legitimate argument supporting a motion to dismiss under Rule 19. Defendants did not carry their burden of persuasion under Rule 19(a)(1)(B)(ii).

2.3.3 Defendants Failed to Meet their Burden of Persuasion that Other Jurisdictions' Officials are Indispensable Parties Under Rule 19(b).

Defendants' use of the term 'indispensable' in the caption of its Motion to Dismiss suggests that Defendants are also asserting that the other jurisdictions' officials are indispensable under Rule 19(b). Because these officials are not 'necessary' under Rule 19(a), and even if the Court were to determine the officials are 'necessary' Defendants do not argue that joinder is not feasible, there is no need for the court to analyze whether the officials are indispensable under Rule

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19(b). ECF No. 16 at 12. Defendants did not carry their burden of persuasion under Rule 19(b).

3. PRAYER FOR RELIEF

For the foregoing reasons, the Yakama Nation respectfully requests that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted this 22nd day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Signed and dated this 22nd day of May, 2018.

s/Ethan Jones

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