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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

KLAMATH IRRIGATION DISTRICT,

Plaintiff,

v.

UNITED STATES BUREAU OF RECLAMATION; DAVID BERNHARDT, Acting Secretary of the Interior, in his official capacity; BRENDA BURMAN, Commissioner of the Bureau of Reclamation, in her official capacity; ERNEST CONANT, Director of the Mid-Pacific Region, Bureau of Reclamation, in his official capacity; and JEFFREY NETTLETON, in his official capacity as Area Manager for the Klamath Area Reclamation Office,

Defendants

SHASTA VIEW IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, VAN BRIMMER DITCH COMPANY, TULELAKE IRRIGATION DISTRICT, KLAMATH WATER USERS ASSOCIATION, BEN DUVAL, and ROB UNRUH,

Case No.: 1:19-cv-00451-CL (lead)
Case No.: 1:10-cv-00531-CL

THE KLAMATH TRIBES' MOTION TO DISMISS FOR FAILURE TO JOIN A PARTY UNDER RULE 19

Request for Oral Argument

Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION; ERNEST CONANT, in his official capacity as the Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; JEFFREY NETTLETON, in his official capacity as the Area Manager of the Klamath Basin Area Office of the United States Bureau of Reclamation,

Defendants

CERTIFICATE OF COMPLIANCE WITH LR 7-1

Undersigned counsel certifies that the parties have made a good faith effort through telephone conference to resolve the issues herein but were unable to resolve the issues.

MOTION TO DISMISS

Expressly reserving their sovereign immunity, the Klamath Tribes (the "Tribes") move, pursuant to Fed. R. Civ. P. 12(b)(7), for an order, as Fed. R. Civ. P. 19 ("Rule 19") requires, dismissing both complaints in this consolidated action[1] for failure and inability to join the Tribes.[2] The Tribes are a required party for three reasons. First, resolution of plaintiffs' claims may impair or impede the Tribes' ability to protect their rights to water and fish in Upper Klamath Lake ("UKL"). Second, the Tribes' absence may leave the Bureau of Reclamation ("Reclamation") subject to an order by this court that is inconsistent with its obligations under the Endangered Species Act ("ESA") and its trust responsibility to protect the Tribes' treaty-

[1] Case Nos. 19-cv-00451-CL and 19-cv-00531-CL were consolidated pursuant to joint motion. Dkt. #17.

[2] On November 6, 2019, this Court granted the Tribes' motion to intervene for limited purpose of filing a motion to dismiss. Op. and Order, Dkt. #61.

based rights to water and fish. Third, for the foregoing reasons, the Tribes' absence prevents this court from according complete relief between the existing parties. The Tribes may not be joined because of their sovereign immunity, which they have not waived and do not waive here, and which Congress has not expressly abrogated. As this action may not proceed in equity and good conscience without the Tribes, this court should dismiss it. The Tribes also seek dismissal pursuant to Fed. R. Civ. P. 12(b)(7) and 19 for failure to join the Hoopa Valley Tribe or the Yurok Tribe, who are also indispensable parties. This motion is based on the court file; the declaration of the Klamath Tribes Chairman, Donald C. Gentry;[3] and the accompanying memorandum.[4]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Tribes have cultural, spiritual, historical, and economic connections to the waters of the Klamath Basin and its fish, including those in UKL, dating back to time immemorial. The Tribes' treaty protects their interest in the waters of the Klamath Basin and its fish. In this action, plaintiffs seek an order from this court that would prevent the Reclamation from managing waters in the Klamath Basin to satisfy the Tribes' treaty-protected water and fishing rights or from protecting certain endangered fish. Because of the significant and adverse effects such an order would have on the Tribes' ability to protect their interests, the risk of inconsistent

[3] Following this Court's order granting the Tribes' motion for limited intervention (Dkt. #61), the Tribes filed a motion to dismiss on November 8, 2019. Dkt. #63. Before further briefing occurred on that motion, the parties stipulated to a revised schedule (Dkt. # 69), which enabled Plaintiffs to file new amended complaints. Dkt. #70 and #73. This motion replaces and supersedes the Tribes' former motion to dismiss, but this motion continues to rely on the previously filed declaration and exhibits (Dkt. #31).

[4] The Tribes also join, and incorporate by reference, arguments in support of dismissal made in the motion to dismiss filed by the Hoopa Valley Tribe. Dkt. #74.

obligations such an order could pose for Reclamation, and the court's inability to accord complete relief to the parties in the Tribes' absence, the Tribes are a required party to this action. However, because the Tribes have not waived their sovereign immunity from suit, and do not do so here, the court cannot order the Tribes to be joined and should instead dismiss the consolidated cases with prejudice.

II. STATEMENT OF FACTS

A. The Tribe's Rights and Interests in the Klamath River

Since time immemorial, the Klamath Tribes and their members have used, and continue to use, the natural resources of the Klamath Basin in what is now the states of both Oregon and California for subsistence, cultural, ceremonial, religious, and commercial purposes. Declaration of Donald C. Gentry in Support of the Klamath Tribes' Motion to Intervene and Motion to Dismiss ("Gentry Decl."), Dkt. #31 ¶ 3. C'waam (Lost River sucker or *Deltistes luxatus*) and Koptu (shortnose sucker or *Chasmistes brevirostris*) have played a particularly central role in the Tribes' cultural and spiritual practices, and they were once the Tribes' most important food-fish. *Id*. ¶ 4; *Klamath Tribes v. United States Bureau of Reclamation*, No. 18-CV-03078-WHO, 2018 WL 3570865, at *1 (N.D. Cal. July 25, 2018) (C'waam and Koptu are "revered by the Klamath Tribes for their cultural, spiritual, and economic significance.").

In 1864, the United States and the Tribes entered into a treaty whereby the Tribes ceded their interests in millions of acres of land and retained a reservation of approximately 800,000 acres, along with "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty Between the United States and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, October 14, 1864, 16 Stat. 707. The Ninth Circuit has recognized that the Tribes' treaty fishing

rights include "the right to prevent other appropriators from depleting the streams waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).

In 1975, the State of Oregon initiated the Klamath Basin Adjudication which led to a quantification of the Tribes' rights in the waters of the Klamath Basin. *See* Klamath Irrigation District ("KID")'s Second Am. Compl., Dkt. #70 at 9:33. In February 2014, the Oregon Water Resources Department filed its Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD") with the Klamath County Circuit Court setting forth the attributes of the Tribes' water rights. *Id*. at 11:39. Under Oregon law, the ACFFOD is in "full force and effect" unless and until its operation is stayed. ORS 539.130(4). Among other things, the ACFFOD recognizes the Tribes' instream rights to water in UKL to accommodate its treaty fishing rights. *See* Dkt. #70 at 12:43(f) (citing ACFFOD 04941).

As this Court has recognized, "[i]t is undisputed that the Klamath Tribes have federally protected treaty rights to water and fishing, giving them an interest in the water contained in Upper Klamath Lake and water released for instream purposes." Op. and Order (Nov. 6, 2019) ("Order on Intervention"), Dkt. #61 at 4.

B. The Klamath Irrigation Project

Pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, and under the authority of the Reclamation Act of 1902, 43 U.S.C. §§ 372 et seq., Congress authorized the construction and development of the Klamath Irrigation Project (the "Project") in and around the Klamath Tribes' ancestral homelands and waters. Gentry Decl. ¶ 5.

Over the ensuing century, the Project's infrastructure and operations have modified the hydrology and water quality of UKL and the entire Klamath Basin through the storage, diversion, and conveyance of water for agricultural, municipal, and hydroelectric purposes

throughout what is now southern Oregon and northern California. *See* United States Fish and Wildlife Service Biological Opinion on the Effects of Proposed Klamath Project Operations from April 1, 2019, through March 31, 2024 on the Lost River Sucker and the Shortnose Sucker ("2019 BiOp") §§ 2.1, 4.3.3.[5] These changes have had devasting impacts on many Klamath Basin species, including the C'waam and Koptu which are now critically endangered. *Id*. at § 6.4. The Project features several major dams, including the Link River Dam at the outlet of UKL, by which Reclamation manages UKL's elevation. *Id*. at § 2.1, 4.3.3.

The Tribes have challenged Reclamation's management of the Project for its failure to protect the C'waam and Koptu, both under the 2019 BiOp and its precursor. Gentry Decl., Ex. A (Letter from Donald C. Gentry, Chairman of the Klamath Tribes, to Jeff Nettleton, U.S. Bureau of Reclamation, regarding Comments of the Klamath Tribes on Reclamation's November 1, 2018 Proposed Action Summary (Nov. 30, 2018)); *Id*., Ex. B (Letter from Donald C. Gentry, Chairman of the Klamath Tribes, to Jeff Nettleton, U.S. Bureau of Reclamation, regarding Comments of the Klamath Tribes on Reclamation's December 12, 2018 Draft Proposed Action Chapter of the Biological Assessment (Dec. 16, 2019)); *Klamath Tribes v. Reclamation*, No. 18-CV-03078-WHO, 2018 WL 3570865 (N.D. Cal. July 25, 2018).

C. Plaintiff's Claims

Plaintiffs Shasta View Irrigation District, Klamath Drainage District, Van Brimmer Ditch Company, Tulelake Irrigation District, Klamath Water Users Association, Ben Duval, and Rob Unruh, (collectively "Plaintiff Water Users") and KID (Plaintiff Water Users and KID referred to collectively as "Plaintiffs") seek remedies which would irreversibly and materially impair the

[5] The 2019 BiOp is available at https://www.fws.gov/cno/pdf/BiOps/FWS-BiOp-Klamath-Project-Operation-VI508.pdf

Tribes' treaty-based rights in the waters and species of the Klamath Basin. Plaintiffs' First Amended Complaints "sought an injunction to stop Reclamation from releasing water for instream purposes or even holding and using water for purposes of compliance with the ESA or other non-Project related purposes." Order on Intervention at 4. After this Court granted the Tribes' motion to intervene as of right, however, Plaintiffs amended their complaints.

While Plaintiffs no longer seek to enjoin "Reclamation from releasing water for instream purposes or holding and using water for purposes of compliance with the ESA," they now seek a judgment declaring such actions unlawful. *See* Plaintiff Water Users' Second Am. Compl. for Remand and Declaratory Relief, Dkt. #73 at 24:85 ("Plaintiffs are entitled to a declaration that Defendants' actions, inactions, findings, and conclusions in adopting and implementing the Action violate section 8 of the Reclamation Act"); *Id*. at 26:92 (seeking a declaration that "collection and retention and use of stored water for ESA-listed species, and use of stored water for ESA-listed species in the Klamath River, are not activities authorized by any applicable law"); *Id*. at 29:102 (seeking a declaration that "[t]he best available scientific and commercial data available does not support that increasing Upper Klamath Lake elevations is expected, directly or indirectly, to reduce appreciably either the survival or recovery of the shortnose sucker or Lost River sucker."); KID's Second Am. Compl. for Declaratory and Injunctive Relief, Dkt. #70 at 17:57 ("Reclamation's actions in adopting and implementing the Amended Proposed Action must be held unlawful"); *Id*. at 19:71 ("KID is entitled to a declaration that Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using water in UKL reservoir for instream purposes"); *Id*. at 20:72 ("KID is entitled to a declaratory judgment that Defendants are violating Section 8 of the Reclamation Act by unlawfully capping the amount of water KID,

its landowners, and other water right holders are able to beneficially use under the ACFFOD and in accordance with Oregon law").[6]

III. ARGUMENT

A. Legal Standard

A party may move to dismiss a complaint for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). "Rule 19 is designed to protect the interests of absent parties, as well as those ordered before the court, from multiple litigation, inconsistent judicial determinations or the impairment of interests or rights." *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911 (9th Cir. 1991). The inquiry is fact-specific and practical. *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir.1986); *Camacho v. Major League Baseball*, 297 F.R.D. 457, 460–61 (S.D.Cal.2013). For this reason, it may be necessary to review evidence beyond the pleadings. *Camacho*, 297 F.R.D. at 461 (quoting *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir.1960)).

B. The Tribes are a required party.

Although Fed. R. Civ. P. 19(a)(1) is drafted in the disjunctive (that is, a person need only satisfy one of its criteria to qualify as a required party), the Tribes meet all of the requirements set forth in Fed. R. Civ. P. 19(a)(1)(A)–(B).

i. The Tribes claim an interest in the action and are so situated that disposing of the action in the Tribes' absence may as a practical matter impair or impede the Tribes' ability to protect the interest.

Rule 19(a)(1)(B)(i) requires joinder of a movant who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." This standard

[6] Although KID captioned its second amended complaint as being one for declaratory *and injunctive* relief, it in fact contains no request for an injunction.

tracks nearly verbatim that under Rule 24(a)(2), which permits intervention by a movant that "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." *See generally MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006) ("These rules are intended to mirror each other." (citing 4 James Wm. Moore et al., *Moore's Federal Practice—Civil*, § 19.03(3)(f)(i) (3d ed. 2006) ("Indeed, the operative language of the two Rules is identical because the Rules were revised to emphasize their interrelationship in 1966.")).

With identical standards, it goes without saying that a movant who satisfies one necessarily satisfies the other. *See* Notes of Advisory Committee on Rule 19—1966 Amendment ("where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion."). In its order granting the Tribes' motion to intervene as of right, this Court recognized that the Tribes' interest in the subject matter is "in the water contained in Upper Klamath Lake and water released for instream purposes," which comes from their "federally protected treaty rights to water and fishing." Dkt. #61 at 4. The Court then held that granting Plaintiffs' complaint to enjoin "Reclamation from releasing water for instream purposes or holding and using water for purposes of compliance with the ESA" would "directly" impair the Tribes' interest. *Id*. at 5. Because this Court held that the Tribes met the corresponding standard under Rule 24(a)(2) in its order granting the Tribes' motion to intervene as of right, the Court need not revisit the analysis to determine that the Tribe meets the standard under Rule 19(a)(1)(B)(i).

The fact that Plaintiffs have since amended their complaints does not change the analysis under this rule. The relevant inquiry remains whether the Tribes' interests "would be substantially affected in a practical sense by the determination made in an action," Order on Intervention, Dkt. #61 at 4 (citing Berg, 268 F.3d at 822). Specifically, the Court focuses on the "future effect pending litigation will have on" the Tribes. *Id*. (quoting *Palmer v. Nelson*, 160 F.R.D. 118, 122 (D. Neb. 1994) (emphasis in original)).

As a practical matter, both Plaintiffs' former request for an injunction and current request for certain declaratory relief would equally impair the Tribes' interests. Specifically, if the Court issued the requested declarations, Reclamation would just as soon discontinue "holding and using water for purposes of compliance with the ESA," Order on Intervention, Dkt. #61 at 4, as it would after an injunction against such action. *See Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("A declaratory judgment cannot be enforced by contempt proceedings, but it has the same effect as an injunction in fixing the parties' legal entitlements . . . A litigant who tries to evade a federal court's judgment—and a declaratory judgment is a real judgment, not just a bit of friendly advice—will come to regret it."). *See also Cutler v. U.S. Bank Nat'l Ass'n*, No. 3:18-CV-01045-YY, 2018 WL 7131644, at *10 (D. Or. Dec. 3, 2018), *report and recommendation adopted in relevant part*, No. 3:18-CV-01045-YY, 2019 WL 157919 (D. Or. Jan. 9, 2019) (holding that a declaratory judgment could impair or impede an absent party's interest under Rule 19 by necessitating additional litigation to resolve the absent party's interest).

In fact, as this Court has already recognized, eliminating the risk of an imminent injunction does not change the analysis. Order on Intervention at 5 ("Even if the restraints of the injunction do not go into effect right away, there is no guarantee that the Defendants will be able to ameliorate the conflict between the complex and varying water priorities in such a way that

the Hoopa Valley Tribe and the Klamath Tribes are not impacted."). *Id*. Finally, there can be no question that Plaintiffs' requested relief would have practical effects on the Tribes' interest when they ask for a remand "of Defendants' determinations challenged in this action with direction to comply with the legal rulings of the Court." Dkt. #73 at 33:5.

Plaintiffs' amendments thus fail to vitiate this Court's prior ruling that the requested relief may impair or impede the Tribes' interest in water allocations to protect their treaty protected resources.

ii. The United States does not adequately represent the Tribes' interest.

In assessing whether disposition of an action may impair or impede a person's ability to protect its interest, the Ninth Circuit asks whether the present parties adequately represent the person's interest. *See Alto v. Black*, 738 F.3d 1111, 1126–29 (citing *Washington*, 173 F.3d at 1167); *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1180; *White v. Univ. of Cal.*, 765 F.3d 1010, 1027. This is the same question a court asks when determining whether a party is entitled to intervene as of right pursuant to Rule 24(a). *See Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) ("The [question under Rule 19(a)(1)(B)(i)] whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Fed.R.Civ.P. 24(a)").

In its order granting the Tribes' motion to intervene as of right, this Court held that the parties to the case inadequately represented the Tribes' interest. Dkt. #61 at 6 ("[the Tribes] have a specific interest in ensuring that their federally reserved fishing and water rights are preserved to their full extent. This is not the same as the defendant's more general interest in following and enforcing regulations and defending agency actions."). The Court need not revisit this decision

for purposes of this motion as nothing in Plaintiffs' amendments to their complaints changes the analysis.

Plaintiffs' abandonment of their requests for injunctive relief has not changed the respective interests of the parties in the case. The Tribes continue to have a "concrete interest in preserving the continued holding of a certain amount of water" in UKL to benefit their treaty resources while Reclamation[7] has a "more general interest in following and enforcing regulations and defending agency actions." Order on Intervention, Dkt. #61 at 6. Nor do the amendments alter the fact the Tribes and Reclamation are differently situated when it comes to their interests in ensuring compliance with the ESA. *See* Dkt. #63 at 15. Even as amended, Plaintiffs' complaints request relief that would constrain Reclamation's authority under the ESA, thereby undermining the protections the ESA affords the Tribes' treaty-protected right to fish. And the Court has already determined that, with respect to this ESA-related interest, Reclamation cannot adequately represent the Tribes. *Id*. at 5-6.

iii. Resolving the action in the Tribes' absence may leave Reclamation subject to inconsistent obligations because of the Tribes' interest.

The Tribes expressly incorporate section III.B.3. of Hoopa Valley Tribe's Mot. To Dismiss, Dkt. #74 at 29. Where the Hoopa Valley Tribe has federal reserved water and fishing rights, the Tribes likewise have rights protected by treaty, including treaty-based right to fish and to federal reserved water rights that have been adjudicated in the ACFFOD.

C. Joinder is not feasible.

"Federally recognized Indian tribes enjoy sovereign immunity from suit and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal

[7] In this section, "Reclamation" refers to all the federal defendants.

immunity by Congress." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) (citations omitted). The Tribes have not waived, and do not now waive, their sovereign immunity and Congress has not abrogated it. Therefore, joinder is not possible, let alone feasible.

D. The action cannot proceed in equity and good conscience among the existing parties.

The Tribes incorporate section III.C. of the Hoopa Valley Tribe's Mot. To Dismiss, Dkt. #74 at 31-35. The Tribes add that, unlike the Hoopa Valley Tribe, which will be prejudiced if Plaintiffs are afforded their requested relief because Reclamation would be prevented from releasing water downstream, the Tribes would be prejudiced because, in a similar circumstance, Reclamation would be prevented from retaining water in UKL for non-irrigation purposes, in derogation of its obligations under the ESA and its trust responsibility to the Tribes. Plaintiffs, Reclamation, the Tribes, and the tribes of the lower Klamath Basin including the Hoopa Valley Tribe are all competing over a limited resource. Plaintiffs' claims in this case and the vindication of the Tribes' interests may be mutually exclusive. This action therefore cannot proceed without the Tribes, who cannot be joined to it. It must be dismissed with prejudice.

E. The public rights exception does not apply.

The Ninth Circuit recognizes a public rights exception to dismissals based on Rule 19(b). *See Verity*, 910 F.2d at 559 n.6. To qualify for the public rights exception, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002) (internal quotations omitted). "Almost any litigation, however, can be characterized as an attempt to make one party or another act in accordance with the law." *Id*. Accordingly, the Ninth Circuit refused to apply the public rights exception in derogation of tribal sovereign immunity where plaintiffs' interest

in an action was "in freeing themselves from the competition of Indian gaming, not in establishing for all the principle of separation of powers." *Id*. Similarly, in *Kescoli v. Babbitt*, the Court rejected plaintiff's argument that it was vindicating a public interest by enforcing the Surface Mining Control and Reclamation Act, because plaintiff's claim was "a private one focused on the merits of her dispute rather than on vindicating a larger public interest." 101 F.3d 1304, 1311 (9th Cir. 1996). The Ninth Circuit recently reframed the public rights analysis as "whether the litigation *threatens* to destroy an absent party's legal entitlements." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 860 (9th Cir. 2019) (emphasis original).

As in *Hull* and *Kescoli*, plaintiffs here are concerned with vindicating their own rights—not those of the public. Plaintiffs seek relief from Reclamation's alleged interference with their access to water under state law-based water rights and contracts with Reclamation, not enforcement of the Reclamation Act and ESA for the benefit of the greater public. *See* Dkt. #70 at 1:1 ("Plaintiff [KID], on behalf of itself and its landowners, brings this action for declaratory and injunctive relief to protect their private property rights."); Dkt. #73 at 2-4:5-12 (describing the representative scope of each party to the complaint). Moreover, as in *Dine Citizens*, this litigation *threatens* to destroy the Tribes' entitlement to water for their own use and the protection of C'waam and Koptu under their treaty. Because this case is "a private one focused on the merits of [the] dispute rather than on vindicating a larger public interest" and the litigation threatens to destroy or severely compromise the Tribes' pre-existing legal rights and entitlements, the public rights exception does not apply.

IV. CONCLUSION

For the foregoing reasons, the Tribes are a required party. The Tribes' sovereign immunity makes joinder infeasible, however, and the case cannot proceed without the Tribes in equity and good conscience. The court should grant the Tribes' motion to dismiss and dismiss these consolidated cases in their entirety with prejudice.

Dated: February 14, 2020.

s/ Jay D. Weiner
Jay D. Weiner, #182247

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on February 14, 2020, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

*s/Jay D. Weiner*_____

Jay D. Weiner