IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COURTHOUSE NEWS SERVICE, Plaintiff, v. LOREN JACKSON, in his official capacity as Harris County District Clerk, and WES MCCOY in his official capacity as Chief Deputy – Services for the Harris County District Clerk's Office, Defendants.	)	Civil Action No. H-09-1844

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION FOR DISCOVERY

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PLAINTIFF'S REPLY BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION FOR DISCOVERY

COMES NOW Plaintiff Courthouse News Service ("Courthouse News") and files its *Reply Brief in Support of Supplemental Motion for Discovery*, and in support thereof would show the Court as follows:

I. SUMMARY OF ARGUMENT

1. The Response of the District Clerk (Doc. 66) unnecessarily repeats many of the same flawed legal arguments already made in briefing on the merits of the pending Rule 60(b)(5), (6) motion (Doc. 59).[1] With respect to the relevant issue presented by the Supplemental Motion for Discovery (Doc. 65) – whether discovery should be permitted – the District Clerk takes three untenable positions: (1) discovery is not, or should not be, permitted in a Rule 60(b) proceeding like this one; (2) only publicly available information and her own self-serving declarations should be considered by the Court; and (3) Courthouse News has not identified any relevant discovery that is needed. None of these arguments have merit.

2. First, Courthouse News relies on precedent, including from this very district, making clear that discovery is permitted in a Rule 60(b)(5), (6) proceeding. (Doc. 65, Suppl. Motion, at pp. 2-3). The District Clerk does not dispute this precedent, but instead attempts to distinguish the cases because they do not involve similar factual issues. Yet, the District Clerk fails to cite a single case where requested discovery in a Rule 60(b)(5), (6) proceeding was denied, under any set of facts. Discovery is not only permitted but essential where a claim of changed circumstances is central and can only be assessed upon a full evidentiary record.

[1] The District Clerk continues to challenge whether there have been any material changes in the law. Of course, that is a legal question for the Court and not relevant to the request for discovery related to material changes in ***facts***. Similarly, the claims that Courthouse News wants to "intercept" filings and cause violation of "numerous state laws" are also legal arguments not relevant to the request for discovery. Further, whether Courthouse News should have "anticipated" a large increase in after-hour filings, four years before Texas established statewide e-filing in 2014, is, again, a legal argument not pertinent to the instant motion.

3. Second, the notion that the Court and Courthouse News must rely only on public information and self-serving declarations submitted by the District Clerk is flatly unreasonable. Indeed, the District Clerk ***disputes*** publicly available information regarding timely access, including statistics presented in the Rule 60(b) motion demonstrating inordinate delays related to after-hour filings and violations of the prior judgment. (Doc. 59, at pp. 11-12). Shockingly, the public record is also being censored. As shown below, in clear coordination with the District Clerk, the Office of Court Administration ("OCA") has denied access to public information regarding the press review queue, a simple and practicable means of providing on-receipt access to new public petitions once filed, and the Texas Judicial Committee on Information Technology ("JCIT") has similarly blocked public access to meeting minutes related directly to the queue.

4. Here, the District Clerk has presented three declarations (two of which were filed as attachments to a Sur-Reply in an attempt to escape scrutiny) that contain hotly disputed statements of fact and rank hearsay that are not based solely on public information, and in some instances contradict prior statements. For example, in the Declaration of David Slayton, Director of the OCA (attached to a ***Sur-Reply***, Doc. 64, at Exh. 2, p. 4), he states that press access before processing cannot be implemented due to legal concerns, when he previously said it could be provided. Slayton further states that the queue is expensive at $200,000 per year, whereas numerous courts have implemented the queue without charge, confirmed by representatives of e-filing vendor Tyler Technologies ("Tyler"). Frankly, it is indefensible for a governmental party to demand that the Court simply accept as true one version of these and other disputed material facts (many of which were first asserted in a Sur-Reply) without the benefit of discovery and cross-examination.

5. Third, Courthouse News has already identified the discovery needed in this case. In the original motion, Courthouse News explained that Rule 60(b) relief turns, in part, on whether

there has been a material change in ***factual*** circumstances, such that more timely access is required under the practicability standard. (Doc. 59, at pp. 13-20). In its Reply Brief in support of the Rule 60(b) motion, Courthouse News identified very specific areas of discovery directly relevant to the change in circumstances and practicability analysis. (Doc. 63, at p. 17). Now, however, after dumping two declarations in the record as attachments to a Sur-Reply, the District Clerk seeks to block testing of the veracity of those declarations through discovery. Not surprising, perhaps, given the contradictions and false statements that have been uncovered. Nevertheless, the objective of providing a full record to the Court is not harassment, as claimed, but essential to an evaluation of changed factual circumstances and whether relief is practicable and, thus, required.

6. Simply put, Courthouse News seeks focused, relevant discovery critical to the Court's ability to assess the grounds for Rule 60(b) relief. The District Clerk unreasonably opposes any discovery whatsoever, without any cited precedent or valid reason. The Court should follow precedent and permit discovery in this proceeding.

II. STATUS OF PROCEEDING & STATEMENT OF ISSUES

7. Pending before the Court is a motion for relief pursuant to Rule 60(b)(5), (6) (Doc. 59). The instant reply brief is filed in support of a Supplemental Motion for Discovery (Doc. 65).

8. The sole issue presented here is whether Courthouse News should be permitted to conduct discovery in this Rule 60(b) proceeding, in advance of an evidentiary hearing, to provide a full record to the Court.

III. STANDARD OF REVIEW

9. The standard of review for determining whether Rule 60(b)(5) relief is warranted is controlled, in part, by a fact-intensive inquiry; that is, whether a material change in circumstances has occurred that renders the prior judgment prospectively inequitable. *See Horne v. Flores*, 557 U.S. 433, 472 (2009); *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 385–87,

93 (1992); *Flores v. Arizona*, 789 F.3d 994 (9th Cir. 2015); *League of United Latin American Citizens v. City of Boerne*, 659 F.3d, 421 (5th Cir. 2011), *Cook v. Birmingham News*, 618 F.2d 1149, 1151-52 (5th Cir. 1980).

10. In the context of the prior judgment here, the First Amendment requirement of timely access to court records is governed by the practicability standard. *See, e.g.*, *Courthouse News Service v. Planet*, Case No., CV 11-08083, 2016 WL 4157210, at *11 (C.D. Cal. May 26, 2016) ("*Planet III*"), *aff'd in part, rev'd in part by* 947 F.3d 581 (9th Cir. 2020); *Courthouse News Service v. Schaefer*, 440 F. Supp. 3d 532 (E.D. Va. 2020); *Courthouse News Service v. Tingling*, No. 16 Civ. 8742 (ER), 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016).

11. The U.S. Supreme Court and Ninth Circuit have required full assessment of any claimed changed circumstances under Rule 60(b)(5), and it is an abuse of discretion not to reform a judgment when supported by changed circumstances. *Horne v. Flores*, 557 U.S. 433, 472 (2009); *Flores v. Arizona*, 789 F.3d 994 (9th Cir. 2015). Accordingly, lower courts permit discovery. *Horne, ,* 557 U.S. at 472; *Frazar v. Ladd*, 457 F.3d 432, 435 (5th Cir. 2006); *Jackson v. Los Lunas Ctr.*, No. CIV 87-839 JAP/KBM, 2019 WL 2581629, at **11–12 (D.N.M. June 21, 2019); *Flores v. Arizona*, No. 92-CV-596-TUC-RCC, 2013 WL 10207656 (D. Ariz. Mar. 29, 2013); *MMAR Grp., Inc. v. Dow Jones & Co., Inc.*, 187 F.R.D. 282, 286 (S.D. Tex. 1999).

IV. ARGUMENT & AUTHORITIES

A. Discovery is Permitted Under Rule 60(b)

12. The precedent cited above makes clear that discovery is permitted when a change in circumstances is alleged in a Rule 60(b)(5) proceeding. The District Clerk fails to cite a single case where requested discovery was denied in such a proceeding. Instead, the District Clerk simply argues that discovery should not be allowed ***here*** because the factual circumstances at issue are different from cases where discovery was permitted. (Resp. at pp. 6-9). This is a distinction without

a difference – the important similarities are apparent: (1) a proceeding under Rule 60(b)(5); and (2) a claim of changed factual circumstances rendering the prior judgment inequitable.

13. If discovery were precluded in a case like this, there would be no ability to develop a record to support relief, rendering Rule 60(b) ineffective. The Ninth Circuit, after remand and direction from the U.S. Supreme Court, has made clear that a district court commits error when it fails to fully evaluate the alleged change in factual circumstances in a Rule 60(b)(5) proceeding. *Flores v. Arizona*, 789 F.3d 994 (9th Cir. 2015) (after remand from *Horne v. Flores*, 557 U.S. 433 (2009)). Discovery is particularly important here because the parties dispute materially relevant facts centered on the practicability of providing more timely access, as outlined below.

14. The District Clerk's unreasonable position finds no support in precedent, undermines the very purpose of Rule 60(b), and ultimately frustrates the ability of this Court to rule with a fully developed record.

B. <u>The Requested Discovery is Focused and Essential</u>

15. Courthouse News previously identified very specific categories of discovery that are essential in this proceeding, which include the following (Doc. 63, at p. 17):

(1) volume of after-hour filings, and how they have grown over time;

(2) volume of filings from midnight to 4:30 p.m. that are not being made available as required;

(3) the process used by the District Clerk from receipt to posting online, and the cause of delays;

(4) justifications relied upon for delay, including the apparent "process-first" policy; and

(5) whether the requested access is "practicable," since precedent establishes that the required level of access is determined by a practicability analysis.[2]

[2] This discovery can be obtained in the traditional way, without any undue burden, with focused Interrogatories, Requests for Production, limited third-party document subpoenas, and depositions of material witnesses.

16. The District Clerk responds to the prospect of this focused discovery with near hysteria. Similar to the recalcitrant behavior identified by Judge Harmon in the initial proceeding, the District Clerk (with the support of OCA) throws up every roadblock imaginable – none of which are legitimate – to evade discovery and a ruling based on a fully developed record.

17. Perhaps the most troubling roadblock is the claim that all that is needed to evaluate the Rule 60(b) motion is publicly available information and the District Clerk's own self-serving declarations. (Resp. at pp. 5-6, 8). It is hard to take this position seriously, particularly where the District Clerk relies heavily on declarations submitted with a Sur-Reply because its original response was woefully inadequate. In any event, the District Clerk disputes evidence gathered by Courthouse News from the public record regarding timely access, including statistics presented in the Rule 60(b) motion demonstrating inordinate delays related to after-hour filings and violations of the Judgment. (Doc. 59, at pp. 11-12). The District Clerk is custodian of the court records,[3] and thus possesses far more non-public data regarding volume of filings, access delays, justifications for delay, and the overall practicability of a press review queue.

18. This position is particularly untenable given that the OCA, in response to a Texas Public Information Act request for public documents related to e-filing, has taken the position that responsive documents cannot be disclosed to Courthouse News due to the litigation exception applicable to this very lawsuit. (Exh. 1-A). This position, clearly taken in coordination with the District Clerk and the County Attorney's Office, invites formal discovery to obtain the information.

19. Similarly, in another attempt to shield relevant information from use in this lawsuit, the JCIT[4] has blocked public access to meeting minutes where the press review queue was

[3] *See* Local Gov't Code § 51.303(a).

[4] Texas Judicial Committee on Information Technology.

presented to the committee for consideration at meetings that occurred in February and October, 2020.[5] Tellingly, all other committee minutes are available online, but not the minutes where the press review queue is discussed. The timing of the agenda item for the committee to discuss (and reject) the press review queue in October, 2020 is particularly suspicious, as it was taken up only after this Rule 60(b) proceeding was initiated. Thus, otherwise public information is being shielded from Courthouse News, obviously in coordination with defense of this proceeding to affect the outcome, which naturally invites the question "why, and what else is being hidden?"

20. With respect to declarations submitted by the District Clerk, as shown below, they are littered with disputed questions of fact and hearsay, and thus cannot possibly be relied upon on their face to resolve the pending Rule 60(b) motion without discovery.

21. First, it is alleged in several declarations that it is "expensive" to implement a press review queue. For example, the District Clerk, in reliance on hearsay contained in a declaration submitted by David Slayton of OCA, alleges that Tyler charges $200,000 ***per year*** for the queue, even though it is an existing configuration in Tyler's software that sorts new filings based on case category, a simple task that, if anything, is more rudimentary than similar configured filters available to district clerks.[6] Discovery is needed as to the source and merit of this price quote, as the assertion is hotly disputed – and for good reason.

22. Court officials in five California courts have confirmed, in writing, that there is ***no charge*** to implement the press review queue configuration from Tyler: Napa, Monterey, Kern, Santa Barbara, and Santa Clara. (Exh. 1-B). Moreover, a written report from Director Arthur Pepin of the Administrative Office of the Courts, directed to the Chief Justice and other Justices of the New Mexico Supreme Court, stated: "I confirmed that Nevada, Georgia and California have had

[5] *See* https://www.txcourts.gov/jcit/meetings/. Links to the February 28, 2020 and October 16, 2020 committee meeting minutes are greyed out and unavailable.
[6] *See* Doc. 64, at pp. 12, 18, & Exh. 2, at p. 4.

Tyler install at no cost to the court a press queue . . . .” (Exh. 1-C, at p. 3). Indeed, Tyler’s own representative confirmed that there is no charge to enable the existing press review configuration. (*See id.* at pp. 46-47 of PDF, Attachments to Memorandum). Consistent with these statements, just last week, Gwinnett County in Georgia implemented the press review queue from Tyler at no charge. (Exh 1-D).

23. The press review queue is not new and has existed in the Tyler configuration database for years. In version 3.9 of its e-filing software, Tyler promoted a “Press Reviewer Role” as part of its 2015 user guide, describing the role as follows: “A user with the new Press Reviewer role is granted the access to a Press Review site that contains court documents for specific case types.” (Exh. 1-E, at p. 1, System Overview).

24. These facts raise the question why the District Clerk, working collaboratively with OCA and the e-filing vendor, Tyler, is now representing to this Court that there is a prohibitive charge that makes a press review queue impracticable. The answer is a simple one – money. The State of Texas pays Tyler $19.6 million per year for e-filing software services.[7] As part of this arrangement, both the State and Tyler generate revenue from controlling the gateway to court records. The 2018 contract between OCA and Tyler shows that two years ago, OCA and Tyler entered the business of charging for access to the public record.[8] Together, they have set up a statewide research site – re:SearchTX – whereby charges are extracted from users to access court records. Section 2.5 of the contract amends an earlier version of the agreement as follows: “Tyler shall, on behalf of the Courts, collect fees set by the Supreme Court of Texas for the use of re:SearchTX. . . . Such fees are deposited directly to the Court’s account.”[9] Tyler, in turn, is given an almost unrestricted hand to exploit statewide court records in just about any way it chooses

[7] *See* https://www.txcourts.gov/jcit/electronic-filing/ (internal link is “OCA eFiling Contract”, at Sec. 2.6, p. 4).
[8] *See id*. (internal link is “Amendment 4”).
[9] *See id*. at Sec. 2.5, p. 3 (replacing subsection 3.2(b) of original contract).

under Section 2.5.5. This includes charges for add-on services provided to e-filers and record reviewers. The only limitation is that OCA has seven days to object to any new form of exploitation by the $13 billion-dollar corporation.[10]

25. It may be cliché to say "follow the money," but it is certainly apropos here and explains why the District Clerk, supported by OCA, is so adamant in blocking press and public access before they can charge for access. By trotting out a stalking horse in the form of a "duty to protect privacy" argument, while disavowing any such duty on its website,[11] the District Clerk naturally raises the question of what real reason for blocking on-receipt access lurks behind that stalking horse. The revenue split between the district court clerks, the OCA, and one of the 100 fastest growing corporations in America (which derives most of its income from public funds) leads to the conclusion that generating revenue is at least one reason, if not ***the*** true reason, for the District Clerk's opposition. Not only does OCA and Tyler charge for access to court records, so too do the district clerks, as reflected by sales by the District Clerk on her own website of certified copies of the public record for $1.00 a page. (Exh. 1-F). This explains the District Clerk's staunch resistance to on-receipt access, hence the strategy of throwing every conceivable argument against the wall to see what will stick, as if something that belonged to the District Clerk were being taken away. All three entities are battling mightily against the ability of the press to see and report on new court filings before their governmental monopolies can extract revenue from those same filings. Thus, discovery is essential to get to the bottom of the alleged "cost" roadblock set up by the District Clerk as a means of evading more timely access to new court filings.

[10] *See id.* at Sec. 2.9, p. 8 (replacing section 2.5.5 of original contract).
[11] *See* Doc. 63, at p. 4 ("THE RESPONSIBILITY FOR REDACTING OF PERSONAL IDENTIFIERS WHERE PERMITTED BY THE COURT AND PROPERLY FILING DOCUMENTS TO BE SEALED RESTS SOLELY WITH COUNSEL AND THE PARTIES." . . . . The Harris County District Clerk's Office will not review or redact filings.").

26. Second, the District Clerk repeats baseless claims that providing First Amendment required access would "violate numerous state laws." (Resp. at p. 3). The primary basis of this claim is the alleged obligation for the District Clerk to review e-filer redactions to ensure confidential information is not publicly disclosed. This argument has been fully briefed and has no merit – e-filers ***alone*** are legally responsible for redactions, just as they are in the federal court system. Thus, none of the following statutory or rule citations provided by the District Clerk (Resp. at pp. 3-4) prohibit a press review queue – in fact, most are not relevant at all:

(1) Rule 4.8.4, Technology Standards, Texas Judicial Committee on Information Technology: Rule 4.8.4 merely states that a clerk "may," but is not required to, ask an e-filer to redact "sensitive data." This is entirely discretionary because redaction obligations rests solely with the e-filer. Indeed, Rule 4.8.3 makes clear that a clerk "must" accept e-filings unless sealed or filed by a vexatious litigant.

(2) Texas Gov't Code, 51.303(a): This provision merely states: "The clerk of a district court has custody of and shall carefully maintain and arrange the records relating to or lawfully deposited in the clerk's office." Not relevant.

(3) Texas Gov't Code, 51.318(b)(7), (8): This provision merely permits certain service charges for non-certified and certified copies. Not relevant.

(4) Texas Gov't Code, 118.052: This provision merely permits certain service charges by ***County*** Clerks, not District Clerks. Not relevant.

(5) Local Gov't Code, 118.121: This provision merely permits certain service charges by a ***Justice of the Peace***, not District Clerks. Not relevant.

(6) Local Gov't Code, 118.131: This provision merely permits certain service charges by a ***Commissioners Court***, not District Clerks. Not relevant.

(7) Tex. R. Civ. P. 21c(a-f): This provision merely defines "sensitive data", places the obligation of redaction on the e-filer, and states that a clerk may ***not*** refuse to file the document if sensitive data is included, but "may" identify an error and request resubmission. It also bars posting on the internet, which is not implicated by use of a press review queue that does not constitute posting on the internet.

(8) Tex. R. Civ. P. 21(f)(3), (7), and (8): These provisions merely address e-filing through the e-filing manager system, with requirements for electronic signatures and formatting of documents. Not relevant.

(9) Tex. Civ. Prac. & Rem. Code 30.015: This provision merely requires the current address of a party in a civil action. Not relevant.

(10) Tex. R. App. P. 9.10: This provision merely restates the "sensitive data" provisions of the district court rules, which does not even apply to new civil petitions in the district courts. Not relevant.

27. There is no state law that imposes any obligation upon the District Clerk to double-check e-filer redactions or complete administrative processing of petitions before allowing access. The District Clerk knows this – her own website accurately reflects that the redaction duty falls solely on the e-filer. (Doc. 63, at pp. 3-5, & Exhs. R-1, R-2).[12]

28. Courthouse News is not, as alleged, attempting to "intercept" the clerk's mailbox and see something it should not. A new pleading is filed and a public record at the moment of submission. *See* Tex. R. Civ. P. 21(f)(5) ("An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider"); *see also Jamar v. Patterson* , 868 S.W.2d 318, 319 (Tex. 1993); *Biederman v. Brown*, 563 S.W.3d 291, 303 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Thus, the pleading has already been received and deemed filed, and it was accessible at that time in the world of paper filings before a revenue-generating model entered the picture with e-filing.

29. The "process before access" position raises the question whether the District Clerk is claiming that federal courts, via Pacer, are violating the law by providing the exact same access requested here. Surely not. These claims are a smokescreen designed to thwart timely press and public access that is perceived as threatening a revenue stream to the State, Tyler, and district clerks. Indeed, it is ironic that Slayton from OCA, who submits a declaration claiming that the

[12] *See supra* note 11. On December 7, 2020, the District Clerk reported a "rejection" rate of e-filings during 2020 of only 2.9%, and missed redactions by the e-filer are not included among the reasons for such rejections (all of which are purely technical or administrative defects that can easily be remedied – incorrect case number, incorrect fee, incorrect paper size, missing style or court number, and missing filer signature). (Exh. 2). This is not surprising because clerks are not required to, and in fact do not, substantively review every filing to ensure "privacy" related data is not included.

requested access cannot be provided, has previously stated that it ***can*** be provided: "For all courts – electronically filed documents could be posted before any review." – David Slayton. *See* Exh. 1-C, at p. 23 of 47 of PDF, Resp. to Ques. 3).[13] Now, there are suddenly numerous impediments to providing this access. In reality, there are none, consistent with Slayton's prior statements made before this proceeding was initiated.[14]

30. Third, it is alleged that the District Clerk cannot provide the requested access, as that authority rests solely with OCA. (Resp. at p. 3). This claim is rebutted factually because it has already been shown that all statewide district clerks submit service requests directly to Tyler to modify their review queues. (Doc. 63, at p. 15). The press review queue is nothing more than a configuration that displays new civil court filings based on case type, which is already existing in the Tyler database and available at no charge, as a Tyler representative has made clear: "We did build a configuration for Clark County, Nevada to see filings before they are accepted by the court. Since that time, there a few counties in Georgia who are using the same approach. ***The configuration is in our database, so it is something Tyler would need to do. There is no cost associated with this work."*** (Exh. 1-C, at pp. 46-47 of PDF, Attachments to Memorandum) (emphasis added). This is exactly how it happens in other jurisdictions, where courts and clerks have successfully implemented the press review queue with little effort and no charge by simply requesting it. A recent example is Gwinnett County in Georgia, which just implemented the Tyler press review queue during the week of November 30, 2020, at no charge. (Exh 1-D).

[13] This statement was made in response to a survey eliciting comments from multiple state court officers in opposing on-receipt access in Ventura Superior Court in California with, on the other side, Courthouse News and a long list of media amici, in the Ninth Circuit case of *Courthouse News v. Planet*. The Ninth Circuit ultimately ruled that the First Amendment right of access attaches upon receipt of the public filing.

[14] Slayton also confirmed at that time: "By court rule, ***filers are tasked with redacting sensitive information*** from documents filed with the court." (Exh. 1-C, at p. 23 of 47 of PDF, Resp. to Ques. 4) (emphasis added).

31. Finally, OCA is not a necessary party here, as claimed, because the District Clerk has the ability to request a press review queue, and even if she did not, the responsibility to ensure timely access to court records is the sole responsibility of the legal custodian – the District Clerk. Nor do filings occur through the OCA, as alleged – the filings enter through an e-filing portal and are sent directly to the District Clerk's review queue. The access sought here, and provided in other courts, is based on a configuration that displays only the public filings when they arrive in the clerk's review queue. Thus, it is only ***after*** receipt by the District Clerk that access is requested.

V. CONCLUSION

32. The request by Courthouse News is simple and straightforward – permit relevant, focused discovery to build a complete record for the Court's consideration. In light of numerous contested issues of fact, discovery is essential, particularly where courts have clearly stated that a claimed change in circumstances must be evaluated on a full record. Here, the practicability analysis must include a fair and full evaluation of whether it is, in fact, practicable to provide the requested access, as Courthouse News contends. This necessarily involves examination of the dubious roadblocks erected by the District Clerk, supported by the OCA, which as shown here cannot survive close scrutiny.

Dated: December 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of December, 2020, the foregoing document was forwarded via electronic filing and/or electronic mail to the following counsel of record:

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