UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.

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2:19-CV-11661-DPH-DRG

Hon. Denise Page Hood

Hon. David R. Grand

PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

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PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes and Statutes

Other Authorities

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether the Dumonts have satisfied the requirements for intervention as of right when they have not overcome the presumption of adequacy of representation when the government Defendants have the same ultimate objective, have no support for the claim that they have a substantial legal interest in this case, and have not shown how their alleged interests are implicated by Catholic Charities' relationship with the State of Michigan.

2. Whether the Dumonts have satisfied the requirements for permissive intervention when their involvement would unduly delay or prejudice the adjudication of the original parties' rights.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Blount-Hill v. Zelman,
636 F.3d 278 (6th Cir. 2011)

Bradley v. Milliken,
828 F.2d 1186 (6th Cir. 1987)

Grubbs v. Norris,
870 F.2d 343 (6th Cir. 1989)

Jordan v. Michigan Conference of Teamsters Welfare Fund,
207 F.3d 854 (6th Cir. 2000)

Meyer Goldberg, Inc. v. Goldberg,
717 F.2d 290 (6th Cir. 1983)

United States v. Michigan,
424 F.3d 438 (6th Cir. 2005)

INTRODUCTION

The proposed intervenors, Kristy Dumont and Dana Dumont, do not attest that they have sought or ever will seek to foster or adopt through Catholic Charities West Michigan. Instead, they seek the right to defend an action the government is already defending and police the relationships between the State and child welfare agencies they have never contacted.

To accomplish this goal, the Dumonts are attempting to use a settlement agreement brokered with the State Defendants in other litigation as a means to intervene in any case where a faith-based child welfare agency is exercising the rights granted to it under the U.S. Constitution and Michigan law. In fact, the Dumonts filed another intervention motion in a case pending in the Western District of Michigan. That motion was recently denied for the same reasons it should be denied here.

The Michigan Attorney General, Michigan Department of Health and Human Services, and the Michigan Children's Services Agency adequately represent any interest the Dumonts might have. And further, the Dumonts have not shown they have a substantial legal interest, nor that their ability to protect that alleged interest would be impaired unless they are permitted to intervene. Permitting intervention would only clutter this action, creating undue delay and prejudice to the original parties.

BACKGROUND

In 2015, the Michigan Legislature passed proactive legislation to ensure that faith-based providers could continue to serve foster children consistently with their religious beliefs while at the same time ensuring that no legally qualified person's ability to adopt or participate in foster care is denied. *See* Mich. Comp. Laws §§ 722.124e, 722.124f; *see also* Pl.'s Mot. for Prelim. Inj. 7-9, ECF No. 11. But shortly after passage, the ACLU of Michigan began preparations to challenge these laws.

The Dumonts were recruited by the ACLU to file a lawsuit against the Michigan Department of Health and Human Services and the Michigan Children's Services Agency (collectively "State Defendants") alleging that the agencies' practice of contracting with faith-based foster care and adoption providers violated the Constitution. *See* Pls.' Resp. to Mot. to Intervene Ex. 3, *Buck v. Gordon*, No. 1:19-cv-00286 (W.D. Mich. June 4, 2019), ECF No. 37-3, attached here as Ex. 1; s*ee also* Complaint at ¶ 19, *Dumont v. Lyon,* No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1. They sought a court order prohibiting the agencies from contracting with faith-based providers whose religious beliefs prohibit them from recommending or licensing same-sex couples as foster and adoptive parents. Compl. ¶ 126, ECF No. 1-2. Catholic Charities was not a party to that lawsuit.

During the pendency of the *Dumont* lawsuit, Defendant Dana Nessel campaigned to be Michigan's attorney general. And during that time frame, she asserted that the "only purpose" of Michigan's statutory protections for faith-based foster care and adoption providers was "to discriminate against people" and that those protections were "a victory for the hate mongers." Compl. ¶¶ 141-42, ECF No. 1-2. She then promised that if elected, she would not defend such laws. Compl. ¶ 127, ECF No. 1-2.

Upon taking office, Defendant Nessel fulfilled her promise by instructing the State Defendants to settle the *Dumont* lawsuit. *Id*. The settlement agreement between the State and *Dumont* plaintiffs states that, "[u]nless prohibited by law or court order," Defendants will maintain a nondiscrimination provision in their foster care and adoption agency contracts prohibiting, among other things, sexual orientation discrimination. *See* Settlement Agreement at 2, ECF No. 1-2 (PageID.193). The settlement agreement further states that, "[u]nless prohibited by law or court order," Defendants will enforce the nondiscrimination provision, up to and including contract termination, against a child placing agency that "is in violation of, or is unwilling to comply with, such provisions." *Id.* at PageID.193-94.

Following settlement, the intervenors in the *Dumont* lawsuit who were not parties to that agreement filed suit against the State Defendants in the Western District of Michigan. *See* Complaint, *Buck v.*

Gordon, No. 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019), ECF No. 1. The Dumonts moved to intervene in that case, but were recently denied such relief. *See* Order, *Buck v. Gordon*, No. 1:19-cv-00286 (W.D. Mich. July 31, 2019), ECF No. 52, attached here as Ex. 2.

ARGUMENT

Federal Rule of Civil Procedure 24 requires courts to permit intervention only when that individual "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." Fed. R. Civ. P. 24(a)(2). It further states that courts "may permit" intervention when an individual "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). But in exercising this discretion, a court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Here, the Dumonts cannot establish the requirements for intervention as of right. Nor can they establish that permissive intervention is appropriate because their involvement would unduly delay litigation and prejudice the original parties' rights.

I. The Dumonts cannot justify intervention as of right.

To intervene, a potential intervenor must establish that: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). "Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule." *Id.* (citing *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005)). Here, the Dumonts cannot satisfy the second, third, or fourth elements.

A. The Michigan Attorney General, Michigan Department of Health and Human Services, and Michigan Children's Services Agency adequately represent the Dumonts' alleged interests.

"[T]he applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). The Sixth Circuit "presum[es]" there is adequate representation "when the proposed intervenor and a party to the suit have the same ultimate objective." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (cleaned up). Here, the Dumonts' "ultimate objective" is the same as the existing Defendants'—they want to prevent a preliminary injunction from

issuing, and for the State to cancel Catholic Charities' contracts or penalize it for acting consistently with its religious beliefs.

The Sixth Circuit has held that a "movant fails to meet his burden of demonstrating inadequate representation when 1) no collusion is shown between the existing party and the opposition; 2) the existing party does not have any interests adverse to the intervener; and 3) the existing party has not failed in the fulfillment of its duty." *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000); *Intercontinental Elecs., S.P.A. v. Roosen*, No. 03-72424, 03-72584, 2006 WL 846763, at *2-3 (E.D. Mich. Mar. 30, 2006). Given the strong hostility expressed by the Attorney General to the faith-based views and practices of Catholic Charities, and the resources of the State Attorney General's office, the Dumonts cannot remotely satisfy this requirement.

First, there is no collusion between Catholic Charities and the existing Defendants, as their positions are clearly adversarial. If anything, it is the State and the Dumonts that appear to be working hand in hand.

Second, the Dumonts have not shown that the existing Defendants have any interest that is adverse to the Dumonts. At most, they contend that the State Defendants did not concur with the Dumonts when they filed a motion to dismiss in the *Dumont* litigation. Mot. to Intervene 18, ECF No. 20 ("MTI"). But that was before

Defendant Nessel took office, refused to defend the agencies in that case, and instructed the agencies to settle. Compl. ¶ 127, ECF No. 1-2. The fact that the State has concurred in the Dumonts' requested intervention in this case underscores that they are now playing on the same team. *See, e.g, United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) ("[I]t is significant that [the proposed intervenor] seeks to intervene on the side of the state."). The Dumonts have simply not "shown how their interests differ in the current litigation." *Roosen*, No. 03-72424, 03-72584, 2006 WL 846763 at *3.

Third, the Dumonts have not claimed that the existing Defendants have failed in the fulfillment of their duties. Instead, the Dumonts merely suggest that the Defendants may not make certain arguments based on positions taken in prior litigation under a different Attorney General. But again that is not enough.

On the contrary, there is an assumption of adequacy when the government is advocating for the interest represented by the proposed intervenor. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("[I]t will be presumed that a state adequately represents its citizens when the applicant shares the same interest. . . . Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.") (citation omitted).

Here, the Dumonts' only argument is that they plan to introduce Establishment and Equal Protection arguments that the State may not

raise. But the Dumonts are not part of any relationship between Catholic Charities and the State, and thus have no substantial legal interest in asserting such a defense. While the Dumonts have knowledge about the private settlement agreement between them, the Busk-Suttons, and the State Defendants, those details do not matter here. What matters is whether Catholic Charities can continue to operate consistent with its beliefs. And on that question, the existing Defendants are fully equipped to make all appropriate arguments.

In sum, any interests the Dumonts may have in the questions raised by this lawsuit are more than adequately represented by the existing Defendants. *See* 07/31/19 *Buck* Order, Ex. 2 ("[T]he State is fully capable of protecting any interest the Dumonts have in the terms of the Settlement Agreement . . . . The State Defendants and the Dumonts are fundamentally aligned at this time in not only their views of the Settlement Agreement, but also their views of the merits (or more accurately, the demerits) of Plaintiffs' claims."). Because the Dumonts cannot "overcome the presumption of adequate representation," their request should be denied. *Michigan*, 424 F.3d at 443-44.

B. The Dumonts do not have a substantial legal interest justifying intervention.

To intervene as of right, proposed intervenors must also and separately demonstrate that they have a "significant legal interest in the subject matter of the pending litigation." *Jansen v. City of*

Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990). Although the Sixth Circuit subscribes to "a rather expansive notion of the interest sufficient to invoke intervention of right," this "does not mean that any articulated interest will do." *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir.2007) (citations omitted). To the contrary, the movants must show "a direct, significant legally protectable interest," *United States v. Detroit International Bridge Co.,* 7 F.3d 497, 501 (6th Cir. 1993), in the subject matter of the litigation, sufficient "to make it a real party in interest in the transaction which is the subject of the proceeding." *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (citation omitted).

Here, this case is about Catholic Charities' decades-long relationship with the State and Catholic Charities' constitutional right to continue to receive reimbursements of foster-care expenses from the State on a nondiscriminatory basis. The Dumonts are not parties to that relationship, nor could they be. But despite those facts, the Dumonts assert two interests they contend warrant intervention.

First, the Dumonts contend they have "an interest in protecting the hard-fought Settlement Agreement they obtained in [the *Dumont* litigation]," which they believe would be "vitiate[d]" if this Court protects Catholic Charities. MTI at 10, ECF No. 20. But that settlement agreement was entered into between the Dumonts, the

Busk-Suttons, and the State Defendants. *See* Settlement Agreement, ECF No. 1-2 (PageID.192). Catholic Charities was not a party to that agreement; it cannot violate its terms, nor is Catholic Charities challenging it. *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999) ("[I]t is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein.").

In their briefing, the Dumonts suggest that their settlement agreement was a court-endorsed consent decree. MTI at 10, ECF No. 20. Not so. "Consent decrees typically have two key attributes that make them different from private settlements." *Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 871 (6th Cir. 2015). First, a court retains jurisdiction to enforce the consent decree. *Id.* And second, a consent decree incorporates the settlement agreement's terms into the dismissal order. *Id.* But in *Dumont*, the settlement agreement terms were not incorporated into the court's dismissal order. Order on Stipulation of Dismissal, *Dumont v. Lyon,* No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019),, ECF No. 83. Instead, citing *RE/MAX International, Inc. v. Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001), the court dismissed the case "pursuant to the terms of the settlement agreement." Order on Stipulation of Dismissal at 2, *Dumont v. Lyon,* No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 83. And as *RE/MAX* states, "[t]he phrase 'pursuant to the terms of the [s]ettlement' fails to incorporate

the terms of the [s]ettlement agreement into the order." *RE/MAX Int'l, Inc.*, 271 F.3d at 642 (citation omitted).

Moreover, the Sixth Circuit has held that "[b]efore entering a consent decree," the district court must (1) "determine, among other things, that the agreement is 'fair, adequate, and reasonable, as well as consistent with the public interest[,]'" and must (2) "allow anyone affected by the decree to 'present evidence and have its objections heard[.]'" *Pedreira*, 802 F.3d at 872. None of that occurred in the *Dumont* lawsuit. *See* Stipulation of Voluntary Dismissal with Prejudice and Order on Stipulation of Dismissal, *Dumont v. Lyon,* No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF Nos. 82-83, attached here as Ex. 3.

The Dumonts cite *Jansen* as support, but that decision weighs against intervention here. In that case, intervention was appropriate because the "subject matter of the litigation require[d] an interpretation of [a] consent decree" to which the intervenors were parties. *Jansen*, 904 F.2d at 342. This case, however, does not require interpretation of any consent decree, nor even of the private settlement entered into by the Dumonts.

The Dumonts also cite *Blount-Hill v. Board of Education of Ohio* to argue that Catholic Charities' requested relief would infringe on their "existing contractual rights," MTI at 12, ECF No. 20, but *Blount-Hill* undercuts the Dumonts' claimed right to intervene. There, the Sixth

Circuit held that a movant's indirect financial interest in the outcome of litigation concerning charter school funding was *insufficient* to justify intervention because the movant was "not a party to any challenged contract nor [wa]s it directly targeted by plaintiffs' complaint." *Blount-Hill v. Bd. of Educ.,* 195 F. App'x 482, 486 (6th Cir. 2006).

Here, the Dumonts are likewise not directly targeted by Catholic Charities' complaint, nor do they have any interest in reimbursement payments for foster care expenses that may or may not be paid by the State to Catholic Charities. *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001) (denying intervention because "[the proposed intervenor's] claimed interest does not concern the constitutional and statutory violations alleged in the litigation" but instead concerned only "contractual rights in agreements with the State" tangential to the constitutional challenges at issue). As such, the Dumonts' alleged interest is insufficient. *See* 07/31/19 *Buck* Order, Ex. 2 (stating that the Dumonts' settlement agreement was "an insufficient basis to support intervention").

Second, the Dumonts contend that they have a "substantial interest in avoiding the injury that would result from the relief sought by [Catholic Charities]." MTI at 14, ECF No. 20. But what harm will the Dumonts suffer if Catholic Charities' religious freedom is protected? They are not part of any relationship between Catholic Charities and the State. Indeed, the Dumonts do not claim to have done anything

more than "evaluat[e]," "inquir[e]," and "pursu[e]" fostering and adopting a child from the Michigan child welfare system—activities that Catholic Charities' assertions of constitutional rights in this litigation do not threaten. Mot. to Intervene Ex. B at ¶¶ 9-10, ECF No. 20-3; Mot. to Intervene Ex. C at ¶¶ 9-10, ECF No. 20-4. That is simply not enough. *Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989) (holding that an interest must be direct and substantial, not peripheral or speculative).

The Dumonts cite *Grutter v. Bollinger* for the principle that if Catholic Charities is successful their settlement would be "eviscerated." MTI at 15, ECF No. 20. But their analysis misses the mark. The Court in *Grutter* held that the movants had a substantial legal interest in gaining admission to the University of Michigan. *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). Here, however, the issue is whether Catholic Charities has a constitutional right to continue to receive reimbursements for foster care costs from the State on a nondiscriminatory basis. Catholic Charities' requested relief does not threaten the Dumonts' ability to adopt or foster.

At most, the Dumonts have alleged nothing more than a "general ideological interest in the lawsuit—like seeing that the government zealously enforces [the new State policy that they] support[]."*Granholm*, 501 F.3d at 782 . But that is insufficient. *Id*. If it were not, nothing would prevent other Michigan taxpayers from intervening in a suit like

this one. *Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 419 (E.D. Ky. 2015); *see also Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1331 (11th Cir. 2007) ("An interest shared generally with the public at large in the proper application of the Constitution and laws" is not sufficient for intervention) (citation omitted); *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985) (explaining that in the context of "public law" cases "the governmental bodies charged with compliance can be the only defendants") (citation omitted).

C. The Dumonts' legal interests are not impaired.

For the same reason the Dumonts have failed to identify a significant legal interest, they have failed to show how such an interest would be impaired. The Dumonts contend that "*Jansen* is directly on point." MTI at 16, ECF No. 20. But as discussed before, the "subject matter of [that] litigation require[d] an interpretation of the consent decree" to which the intervenors were a party. *Jansen*, 904 F.2d at 342. This case does not require interpretation of any consent decree, nor the *Dumont* settlement.

While one can construct entirely speculative sets of facts in which the outcome of the present litigation might peripherally affect the Dumonts (though in no event could this litigation actually impair their ability to adopt or foster), such a generalized interest does not justify intervention, and no legal interest of the Dumonts is at issue here. The

Dumonts' generalized interest in this case can be adequately addressed by filing an amicus brief, which Catholic Charities will not oppose.

II. The Dumonts are not entitled to permissive intervention.

"Intervention balances two competing interests—judicial economy resulting from the disposition of related issues in a single lawsuit and focused litigation resulting from the need to govern the complexity of a single lawsuit." *Jansen*, 904 F.2d at 339-40. Here, that balance weighs against intervention.

A. The Dumonts' involvement would unduly delay the litigation and prejudice Catholic Charities.

Permissive intervention is improper where it would cause undue delay or prejudice to the original parties. Fed. R. Civ. P. 24(b)(3). Courts often deny permissive intervention due to delay and prejudice if allowing intervention would add disputed factual questions and prolong or complicate discovery. *S. Carolina v. N. Carolina*, 558 U.S. 256, 287-88 (2010) ("Intervenors do not come alone—they bring along more issues to decide" and "more discovery requests.") (Roberts, J., concurring and dissenting); *Michigan*, 424 F.3d at 445; *Kasprzak v. Allstate Ins.* Co., No. 12-CV-12140, 2013 WL 1632542, at *4 (E.D. Mich. Apr. 16, 2013) (unreported) (denying permissive intervention where "[t]he parties would suffer the costs of extending discovery along with other costs associated with prolonged litigation").

Allowing the Dumonts to join this case would lead to precisely that result. In fact, in an order denying the Dumonts' motion for leave to file a reply brief in support of intervention in the *Buck* litigation, Chief Judge Jonker stated that "[b]etween the filing of th[at] case on April 15 [2019] and [June 12, 2019], the parties have already generated a record of over 1,500 pages." Order, *Buck v. Gordon*, No. 1:19-cv-00286 (W.D. Mich. June 12, 2019), ECF No. 41, attached here as Ex. 4. Chief Judge Jonker ultimately denied the Dumonts' motion to intervene, but the same is proving true here.

Expert reports, declarations, and discovery from another case were all included in the Dumonts' proposed response to the motion for preliminary injunction. *See* [Proposed] Intervenor Defs.' [Proposed] Resp. in Opp'n to Pl.'s Mot. for Prelim. Inj. Exs. A & B, ECF Nos. 23-2, 23-3. Those materials are irrelevant to that motion and the underlying issues in this case. But should the Court grant intervention, Catholic Charities would be forced to respond in many ways, including bringing in experts, and evaluating and responding to discovery from a different case. That exercise will cost this Court, Catholic Charities, and the Defendants valuable time and resources in the process.

In sum, the Dumonts' presence will not add value to this case as the existing Defendants' interests in this case align perfectly with the Dumonts. *See* 07/31/19 *Buck* Order, Ex. 2 ("The State Defendants and the Dumonts are fundamentally aligned . . . ."); *Bay Mills Indian Cmty.*

v. Snyder, 720 F. App'x 754, 759 (6th Cir. 2018) ("The fact that [a proposed intervenor's] position is being represented counsels against granting permissive intervention."). And they have already demonstrated that they will clutter the litigation. *See Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992) (denying an applicant's intervention as it "would only clutter the action unnecessarily").

B. Catholic Charities has no objection to the Dumonts participating in this case as amicus curiae.

The Dumonts have not satisfied the requirements for intervention as of right or for permissive intervention. But should this Court desire to allow the Dumonts to present their arguments, Catholic Charities has no objection to them participating in this case as amicus curiae. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (noting with approval *Bradley*, 828 F.2d at 1194, and explaining that in that case the court affirmed the denial of motions to intervene permissively and as of right in part because "the district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel] to appear as amicus curiae in the case").

CONCLUSION

For the foregoing reasons, Catholic Charities asks this Court to deny the motion to intervene.

Dated: July 31, 2019

Respectfully submitted,

/s/ Jeremiah Galus

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I caused the foregoing to be filed with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

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