

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. SUCV2016-00969

MASSACHUSETTS ASSOCIATION OF
COURT INTERPRETERS, INC., MOUSSA
ABBOUD, SOLEDADE GOMES
DEBARROS, ANAHIT FLANAGAN,
NORMA V. ROSEN-MANN, and MICHAEL
R. LENZ, individually, and on behalf of other
persons similarly situated,

Plaintiffs,

v.

LEWIS "HARRY" SPENCE, in his capacity
as Administrator of the Trial Court, and his
successors in office, MARIA FOURNIER, in
her capacity as the Director of the Support
Services Department of the Trial Court Office
of Court Management and the Office of Court
Interpreter Services Coordinator for the
Administrative Office of the Trial Court, and
her successors in office, and BRUCE
SAWAYER, in his capacity as Manager of
Accounting of the Fiscal Affairs Department
of the Trial Court, and his successors in office,

Defendants,

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SUBSTITUTE PARTY
DEFENDANTS AND TO RE-DEFINE THE CLASS**

Defendants Lewis "Harry" Spence, Maria Fournier, and Bruce Sawayer (collectively "Defendants") oppose Plaintiffs' Motion to Substitute Party Defendants and to Re-Define the Class. Plaintiffs seek to substitute certain new officials employed by the Massachusetts Trial Court ("Trial Court") for the officials currently named as Defendants. But, after this Court's decision on Defendants' Motion to Dismiss, Plaintiffs' only remaining claim is a purported

breach of contract claim, which does not lie against officials of the Trial Court. Defendants do not oppose Plaintiffs' proposal to name the Trial Court as a Defendant because the Trial Court would be the only appropriate party for a breach of contract claim.¹

As to Plaintiffs' Motion to Re-Define the Class, Plaintiffs' proposed class does not meet any of the requirements of Rule 23. After this Court granted, in part, Defendants' Motion to Dismiss, the only remaining claim in this matter is for breach of contract. And this claim, by Plaintiffs' own admission, involves "[w]ide variations...with respect to how plaintiff[s]...are, in fact, being paid for work" by the Trial Court. *See* Pls.' Proposed Substituted Amended Complaint ("PSAC") (dated Apr. 23, 2018), at page 3(a). Plaintiffs have not met their burden to show "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). Nor have Plaintiffs shown that they meet the requirements of numerosity, commonality, typicality, or adequacy of representation, as outlined below. *See* Mass. R. Civ. P. 23(a).

BACKGROUND

Plaintiffs in this lawsuit are five individuals who are used by the Trial Court as *per diem* court interpreters, as well as a nonprofit corporation that, *inter alia*, advocates on behalf of judicial interpreters. *See* First Am. Compl. (Mar. 23, 2016) ("Am. Compl."); PSAC ¶¶ 1-6. The Office of Court Interpreter Services ("OCIS"), a department of the Trial Court, has hired *per diem* court interpreters since 2006. Am. Compl. ¶ 35; PSAC ¶ 36. These *per diem* interpreters are classified as independent contractors and submit to OCIS a monthly or bi-monthly schedule,

¹ Defendants have served a Motion to Conform Pleadings contemporaneously with this Opposition, which requests that this Court dismiss the individual Defendants and also dismiss the Massachusetts Association of Court Interpreters ("MACI") as a Plaintiff, because none of these parties are proper parties in this breach of contract action.

indicating their availability for court assignments. Am. Compl. ¶ 38; PSAC ¶ 39. The Trial Court also uses staff court interpreters who it employs directly.

In their initial and amended complaints, Plaintiffs claimed that they should be considered employees rather than independent contractors. *See, e.g.*, Am. Compl. ¶¶ 36, 61-71. On November 3, 2016, this Court granted the Defendants' Motion to Dismiss all of Plaintiffs' claims in regard to their classification as independent contractors because the statute that authorizes such claims specifically exempts most Commonwealth of Massachusetts employers from the provisions of the statute. *See* Docket #10 (Nov. 3, 2016).

What remains after the Court's November 3, 2016 Order is Plaintiffs' claim for breach of contract by the Trial Court. Am. Compl. ¶¶ 72-75; PSAC ¶¶ 62-65.² Plaintiffs claim that they have a contract with the Trial Court because of a document called the Standards and Procedures of OCIS ("S&P"). The S&P, attached as an exhibit to every version of Plaintiffs' Complaint, states that it "provide[s] court interpreters, judges, attorneys, and other court personnel with important information about accessing, using, and providing quality court interpreter services in the Massachusetts Trial Court." Am. Compl. Ex. A § 1.01; PSAC Ex. A § 1.01. Plaintiffs claim that the S&P "govern[s] *per diem* court interpreters" and that the S&P is a contract between Plaintiffs and Defendants. Am. Compl. ¶ 73; PSAC ¶¶ 63-64.

In both their operative Amended Complaint, and their proposed Substituted Amended Complaint, Plaintiffs claim that the Trial Court has breached the terms of the S&P by, *inter alia*, (1) inconsistently paying for their half or full day commitments; (2) occasionally replacing *per diem* "certified" interpreters with *per diem* "screened" interpreters, whom Plaintiffs allege are

² Plaintiff's Amended Complaint also asserted claims for quantum meruit and unjust enrichment. In their Proposed Substituted Amended Complaint, Plaintiffs have not reasserted these claims which are generally not cognizable when a plaintiff also asserts a breach of contract claim. *See* PSAC ¶¶ 62-65. Because Plaintiffs are declining to reassert these claims, Defendants do not address them here.

less qualified; (3) occasionally not paying court interpreters for canceled court hearings; (4) reducing pay for court interpreters who arrive late; and, (5) reimbursing various expenses in different ways. Am. Compl. ¶¶ 40-53, 72-75; PSAC ¶¶ 41-55, 65. But, as outlined in detail below, these claims are far from sufficient to demonstrate that this Court should certify this case as a class action and, in fact, demonstrate that a class action is not the superior method for adjudicating these claims.

On April 23, 2016, Plaintiffs served a motion with two procedural requests pursuant to Rule 15(a): (1) to substitute two of the named defendants (employees and former employees of the Trial Court) for two other employees of the Trial Court³ and to add the Trial Court as a defendant; and (2) to “redefine” the class. Plaintiffs have not moved to certify a class in this action pursuant to Rule 23.

ARGUMENT

The Trial Court opposes Plaintiffs’ Rule 15 motion on several grounds. First, with respect to Plaintiffs’ motion to add new defendants who are employees of the Trial Court, that request is improper. Plaintiffs’ only claim in this lawsuit is for a purported breach of contract, which does not lie against individuals. The Trial Court, however, does not oppose Plaintiffs’ proposal that it add the Trial Court itself as a Defendant. *See infra* Section I. Second, to the extent Plaintiffs’ request to “redefine” the class is in essence a request to certify a class pursuant to Rule 23, Plaintiffs’ proposed class meets none of the requirements of Rule 23 and Plaintiffs make only the barest conclusory allegations otherwise. *See infra* Section II.

³ Plaintiffs propose to dismiss two former officials with current officials. One such official is Maria Fournier, the former Director of Support Services. Plaintiffs move to replace Ms. Fournier with Sybil Martin, whom Plaintiffs claim is the current Director of Support Services. *See* PSAC ¶ 22. However, upon information and belief, Sybil Martin is not the current Director of Support Services. The Director of Support Services position is not currently staffed.

I. Plaintiffs' Breach of Contract Claims Do Not Lie Against Individual Officials of the Trial Court

As outlined above, Plaintiffs' original complaint challenged the Trial Court's classification of *per diem* court interpreters as independent contractors rather than as employees. This Court granted the Defendants' Motion to Dismiss all of those claims because they are barred by the Commonwealth of Massachusetts' sovereign immunity. *See* Docket #10 (Nov. 3, 2016).

Plaintiffs' remaining claim is for breach of contract. *See* PSAC ¶¶ 62-65. In this claim, Plaintiffs state that the Trial Court's S&P constitutes a contract between the Trial Court and the *per diem* court interpreters, and that the Trial Court has breached this contract. PSAC ¶¶ 62-65. A claim for breach of contract lies against the entity that purportedly entered into the contract—here, the Trial Court. *See* PSAC Ex. A at iii (describing process for developing S&P). And, no individual official may bind his or her employer to contractual terms with implications for the public fisc without express authority. *See Lovering v. Beaudette*, 30 Mass. App. Ct. 665, 668-670 (1991).

Accordingly, Defendants request that this Court deny Plaintiffs' Motion to Substitute Party Defendants insofar as the Motion seeks to replace the Trial Court officials currently named with other Trial Court officials. Defendants do not oppose Plaintiffs' proposal to add the Trial Court as a Defendant because the Trial Court would be the proper party for a breach of contract case.

II. Plaintiffs Have Not Met Their Burden to Demonstrate that a Class Should Be Certified in this Breach of Contract Litigation

Defendants oppose Plaintiffs' motion to certify a class in this matter. "To support class certification under rule 23, plaintiffs must satisfy the four elements of rule 23(a) and the two additional elements of rule 23(b)." *Bellerman v. Fitchburg Gas and Electric Light Co.*, 470

Mass. 43, 52 (2014). Plaintiffs seeking the certification of a class must “provide information sufficient to enable the motion judge to form a reasonable judgment that the class meets the relevant requirements.” *Id.* (internal quotation marks omitted). And, plaintiffs may not satisfy this burden “on the basis of speculation or generalization regarding satisfaction of the requirements of rule 23.” *Weld v. Glaxo Wellcome Inc.*, 434 Mass. 81, 85 (2001). In this litigation, Plaintiffs have not met their burden for either the requirements of Rule 23(a), *see* Section A, *infra*, or the requirements of Rule 23(b), *see* Section B, *infra*.

A. Plaintiffs Have Not Met the Requirements of Rule 23(a)

Plaintiffs propose the following class: “The class consists of both certified and screened court interpreters whose rights under the S&P have been violated by defendants.” PSAC ¶ 7.

Rule 23(a) requires Plaintiffs to show that:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs’ proposed class does not meet any of these requirements.

Starting with Rule 23(a)(1), the “numerosity” requirement, Plaintiffs simply make the conclusory allegation that “[c]lass members...are sufficiently numerous.” PSAC ¶ 8. But, Plaintiffs have made no estimates as to the size of the class, they merely assume that “violations” of the S&P have occurred. PSAC ¶ 7. Plaintiffs state that there are approximately 180 *per diem* court interpreters in total. PSAC ¶ 34. But, although the five named plaintiffs have appended affidavits to the proposed Substituted Amended Complaint, not all of these affidavits allege violations of the S&P. *See* PSAC Exs B-F. These affidavits principally focus on the differences between *per diem* and staff interpreters; however, this Court has already dismissed Plaintiffs’ claims that they have been misclassified as independent contractors. *See* Nov. 3, 2016 Order. In

short, there is nothing to indicate whether some or all of the *per diem* court interpreters may have a breach of contract claim, or whether it is only the named Plaintiffs who may have a claim.

These general allegations are insufficient to meet Plaintiffs' burden.

Plaintiffs do not meet the "commonality" requirement of Rule 23(a)(2), which is discussed in Section B, *infra*, because that requirement is subsumed by Rule 23(b). *See* Mass. R. Civ. P. 23(b) (predominance of common questions and superiority of class method).

Plaintiffs also do not meet the Rule 23(a)(3) requirement that the claims of the named plaintiff representatives are "typical" of the claims of the rest of the class nor do they meet the Rule 23(a)(4) requirement that the named plaintiffs fairly and adequately represent the interests of the class. In their proposed Substituted Amended Complaint, Plaintiffs allege only that the "named plaintiffs' claims are typical of the plaintiff class" and the "[n]amed plaintiffs fairly and adequately represent all class members and do not have antagonistic interests." PSAC ¶¶ 8, 9. These types of "generalization[s]" are insufficient to meet Plaintiffs' burden. *See Weld*, 434 Mass. at 85.

Moreover, the Complaint itself contradicts these general assertions. The five named plaintiffs are all "certified" court interpreters. *See* PSAC ¶¶ 2-6 & Exs B-F. But, the Trial Court uses both "certified" court interpreters, who have met certain qualifying requirements, and "screened" court interpreters, who meet lower minimum requirements. *See* PSAC ¶ 7, n.4 ("The qualifications of screened and certified court interpreters are set forth in Sections 5.03 and 5.04 of the S&P, Exhibit A.").

And, the proposed Substituted Amended Complaint identifies at least one conflict between the interests of "certified" court interpreters and "screened" court interpreters. The Complaint quotes the S&P statement: "Generally, court interpreters will be assigned in the

following sequence: first, Qualified Interpreters or Certified Interpreters, and second, Screened Interpreters.” PSAC ¶ 53. Plaintiffs then allege that the Trial Court “does not follow Section 9.1 of the S&P and, often, screened interpreters are assigned prior to available certified interpreters.” PSAC ¶ 54. This allegation sets up a conflict between certified court interpreters who claim they are receiving insufficient work from the Trial Court and screened court interpreters whose concerns are not reflected in the proposed Substituted Amended Complaint. Thus, the five named plaintiffs are not typical of the screened court interpreters nor can they be said to “fairly and adequately” represent the interests of the screened court interpreters which are opposed to their own.⁴

Plaintiffs have not met their burden under Rule 23(a) and, in fact, their allegations about certified and screened interpreters demonstrate that Plaintiffs’ proposed class would involve conflicts between members. For these reasons, class certification is inappropriate in this case.

B. Plaintiffs Have Not Met the Requirements of Rule 23(b)

Plaintiffs have also failed to meet the requirements of Rule 23(b). Rule 23(b) requires: “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Plaintiffs have not met their burden for satisfying Rule 23(b). Instead, their proposed Substituted Amended Complaint demonstrates that individual issues far outweigh the common issues of the proposed class and that a class action would not be superior to other available methods of adjudication.

⁴ Plaintiffs’ proposed class consists of “both certified and screened court interpreters” but does not include “qualified” interpreters, who must meet additional requirements to be so designated. See PSAC ¶ 7 (class definition); Ex. A (S&P) at §§ 2.03, 2.16, 2.17 (defining certified, qualified, and screened court interpreters). This presents an additional challenge for the “numerosity” of the class because Plaintiffs have not identified the numbers of interpreters in each of these categories that are allegedly aggrieved by violations of the S&P.

“The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context.” *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 363 (2008) (quoting 2A Conte & H.B. Newberg, *Class Actions* § 4.23 (4th ed. 2002)). The court “must engage in an individualized, pragmatic evaluation of the relationship between and the relative significance of the common and individual issues.” *Salvas*, 452 Mass. at 364 (internal quotation marks omitted).

Plaintiffs’ two proposed “common” questions of law and fact are not sufficient for class certification. Plaintiffs state: “question[s] of law and fact are common to the class and predominate over individual issues, including without limitation, namely, whether the S&P constitutes a contract between the class of plaintiffs and defendants and whether defendants violated provisions of that contract.” PSAC ¶ 14.

The first proposed question—whether the S&P is a contract—is a question of law common to *per diem* court interpreters but does not counsel for the certification of a class. Plaintiffs have asked this Court to: “Declare that the Standards and Procedures constitute a contract between Defendants and the class of plaintiffs described herein.” PSAC at page 22(b). The five named Plaintiffs may certainly pursue their requested declaration. And, if they succeed in persuading this Court to declare that a contract exists, any other individual who believes that the Trial Court breached the terms of that contract could then pursue claims based on his or her individual claims of breach. *See Bellermann*, 470 Mass. at 59 (if the named Plaintiffs succeeded in their request for equitable relief, this “equitable remed[y]... would afford relief to those similarly situated notwithstanding the absence of [a certified] class”). A class is not the superior method to answer this type of question.

In addition, the resolution of this asserted question of law “requires no proof”; thus, it “does not weigh heavily in the predominance assessment.” *Fletcher*, 394 Mass. at 603. Here, Plaintiffs assert that the S&P creates a contract between them and the Trial Court. *See* PSAC at pages 2 & 22(b). Plaintiffs make no claim that some sort of verbal discussions between the parties supersede any of the terms of the S&P; instead they explicitly assert that “the totality” of the provisions of the S&P “constitutes a binding contract.” *See* PSAC at page 2. In these circumstances, no testimony or other evidence is required for this Court to determine whether the S&P constitutes a contract; and, accordingly, this questions should not weigh heavily in the predominance analysis.

Plaintiffs’ second proposed question—whether the Trial Court violated provisions of the S&P—is not at all “common” to the members of the proposed class. Plaintiffs’ proposed Substituted Amended Complaint expresses a wide range of concerns. Central to those concerns is the belief that the Trial Court should classify Plaintiffs as employees instead of as independent contractors. *See* PSAC ¶¶ 36-37. But, these claims were dismissed by this Court and did not rely on a purported breach of the S&P.

Another main thread of Plaintiffs’ concerns is that the Trial Court should be paying more for hourly rates, travel time, and the reimbursement of expenses. *See* PSAC ¶¶ 44-49. But, these are also not breach of contract claims. The S&P states that the rate of compensation for *per diem* court interpreters is set by the Committee for the Administration of Interpreters for the Trial Court. *See* PSAC Ex. A at 7.01. Plaintiffs do not allege that this rate is being violated but instead allege that, for example, a *per diem* court interpreter who serves on a case from 11am to 1pm is paid for two hours of work rather than for a “half-day” of work. *See* PSAC at page 2.

But, as Plaintiffs readily admit, the payment of a “half-day” amount is based on “a cornerstone of professional court interpreting” rather than on a reading of the S&P. *See* PSAC ¶ 42.

The S&P states that “Compensable Time shall be calculated beginning at the time the court interpreter arrives at the assigned court and reports to the Court Liaison....If the court interpreter is present at the courthouse for the four-hour period, the court interpreter will receive payment for a half day as long as the court interpreter is available for the full four hour period.” *See* PSAC Ex. A at 7.02. Plaintiffs appear to want to be paid for the full half-day (four hours), even if they only interpreted for two hours and thereafter left the courthouse and were no longer available for additional interpreting. *See* PSAC at pg. 2. But, that does not constitute a breach of contract claim; rather, it is a claimed breach of what Plaintiffs term “a cornerstone of professional court interpreting.” *See* PSAC ¶ 42.

In affidavits attached to Plaintiffs’ Complaint, some of the named Plaintiffs attest that in the past they were paid for a “half-day” of court reporting even if they had interpreted for as little as a half hour and thereafter left the courthouse. According to Plaintiffs, various OCIS employees had permitted various alternative payment arrangements on a case-by-case basis. *See, e.g.,* PSAC Ex F ¶ 3 (“[A]fter I had completed my scheduled assignment...at approximately 9:30 A.M., I called the office, as usual, and was told...‘Sit there...and wait in case we need you.’ I was totally blindsided by this unexpected order and asked to speak to Gaye Gentes, who had been the OCIS manager, and who, as it turned out, was no longer in this position.”). But, claims of changes in policy over time by various Trial Court employees that affected various court interpreters in different ways are not claims that present common class questions. *See, e.g., Fletcher*, 394 Mass. at 604, n.8 (“The usefulness of the class action mechanism is even less

apparent in cases, such as the one before us, which involve allegations of misconduct by one or more defendants over an extended period of time.”).

Plaintiffs’ claims demonstrate that individual questions predominate over class questions. Plaintiffs state that “[w]ide variations are common with respect to how plaintiff class members are, in fact, being paid for work” by the Trial Court. *See* PSAC, at page 3(a). One such “variation” appears to be that certain *per diem* court interpreters were, on some occasions, paid for a half-day (four hours) of work if their court assignment ended at 9:30am and, thereafter, they left court instead of being “available for the full four-hour period,” as contemplated by the S&P. *Compare* PSAC Ex F ¶ 3 with S&P Section 7.02.⁵

Other such “variations” include that court interpreters are “on occasion” not being paid for cancelations. PSAC at page 3; *see also* PSAC ¶ 41 (“*sometimes* court interpreters find that they are no longer needed...the Trial Court requires them to stand by” in order to be paid) (emphasis added). The S&P requires that the Trial Court pay court interpreters a half-day amount if an assignment is canceled with less than 24 hours of notice. PSAC Ex. A § 7.09. The named plaintiffs take issue with this policy decision: “[I]f [the Trial Court] cancels with more than 24 hours in advance, a *per diem* court interpreter receives no compensation whatsoever.” PSAC ¶ 41. But, a disagreement with a policy of the Trial Court does not amount to a common issue of law or fact for which a class action would be the superior litigation form. Nor does the

⁵ In several places in their proposed Substituted Amended Complaint, Plaintiffs assert that a Trial Court practice is in violation of the S&P when, in fact, Plaintiffs are instead still relying upon statutory claims that this Court dismissed from this lawsuit in its November 3, 2016 order. For example, Plaintiffs claim that the Trial Court has not “made payments due for plaintiffs’ invoices in a consistent timely manner, in violation of the S&P, Section 11 and G.L. 29 § 29C.” PSAC ¶ 52. But, Section 11 of the S&P says nothing about the timing of payments of invoices. *See* PSAC Ex. A § 11. Plaintiffs cannot rely on a claim of a supposed breach of the provisions of the S&P regarding the timing of payment of invoices as a “common” question for class members when the S&P is entirely silent as to the timing of payment. Plaintiffs’ proposed Substituted Amended Complaint still reads as if its claims for statutory violations were valid grounds for certifying a class action when, in fact, this Court has dismissed all such claims.

claim that “on occasion” some *per diem* court interpreters are not paid if the cancelation is within 24 hours constitute a common class question.⁶

A final example of the predominance of individual issues in Plaintiffs’ Complaint is the tension, discussed above, between “certified” and “screened” court interpreters. All five named plaintiffs are certified court interpreters who are paid more than screened court interpreters. *See* PSAC page 2 n.3 & ¶ 7, n.4. The named Plaintiffs allege that the Trial Court assigns too many screened interpreters to court hearings when certified interpreters are otherwise available. PSAC ¶¶ 53, 54. But, the Plaintiffs seek to have a class certified of *both* certified and screened court interpreters, despite the conflict between the claims of the named certified interpreters and the unnamed screened interpreters. PSAC ¶ 7. The claims of certain certified interpreters about the amount of court time they are given do not present questions of law or fact that are common to the rest of the proposed class. Instead, these claims are in conflict with the interests of other members of the proposed class and demonstrate that a class action is far from the superior method for fair and efficient adjudication of these concerns.

The allegations that remain in this case after this Court granted, in part, the Defendants’ Motion to Dismiss are predominately claims that are based on individualized concerns and, in fact, some of these individual concerns are in tension with the concerns of other purported class members. Based on Plaintiffs’ own allegations, a class action is not superior to all other available methods for fair and efficient adjudication of these concerns, and Plaintiffs have not met their burden under Rule 23(b).

⁶ Other individual questions are reflected in the Affidavits attached to the Complaint. For instance, one affiant attests that, on four occasions, his pay was docked because he arrived late to court. PSAC Ex. F ¶ 6. Then, after contesting those decisions, he was repaid for two of the four occasions. *Id.* Another affiant states: “I request we be provided access to a secure place within the courthouse where we can place our belongings while we are working in that courthouse.” PSAC Ex. C ¶ 18. These, and many other individual concerns reflected in the Complaint and the Affidavits, are not questions common to the class as a whole but instead reflect individualized concerns about these individuals’ work and their relationships with the Trial Court.

CONCLUSION

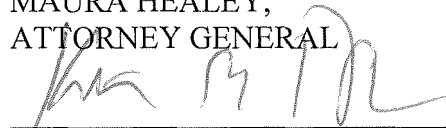
For all these reasons, the Trial Court respectfully requests that this Court deny Plaintiffs' motion to substitute parties, with the exception of the request to add the Trial Court as a defendant, and deny Plaintiffs' motion to certify a class in this litigation.

Respectfully submitted,

LEWIS "HARRY" SPENCE in his official capacity; MARIA FOURNIER in her official capacity; and BRUCE SAWAYER in his official capacity

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Date: May 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day, May 22, 2018, served the foregoing document, upon all parties, by mailing a copy, first class, postage prepaid to:

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