UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA,

Plaintiff,

Case No. 3:19-CV-13188

v.

HONORABLE ROBERT H. CLELAND
MAGISTRATE ANTHONY A. PATTI

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State,

Defendant.
_______________________________/

THE MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24, the Michigan Senate and Michigan House of Representatives ("the Legislature") respectfully request that they be permitted to intervene as Defendants in this matter.

In support, the Legislature relies on the attached brief. The Legislature also submits as Exhibit 1 a proposed Answer to Plaintiff's Complaint for Declaratory and Injunctive Relief.

In compliance with Local Rule 7.1(a), counsel for the Legislature had a telephone conference with Defendant's counsel on November 27, 2019, during which the Legislature's counsel explained the nature of the motion and the relief sought. Defendant's counsel did not concur but stated that Defendant will not

oppose the motion. On November 27, 2019, counsel for the Legislature conducted an email conference with Plaintiff's counsel. Plaintiff opposes the motion.

Respectfully submitted,

BUSH SEYFERTH PLLC
Attorneys for the Michigan Senate and the Michigan House of Representatives

By: /s/ Patrick G. Seyferth
Patrick G. Seyferth (P47475)
Roger P. Meyers (P73255)
Michael K. Steinberger (P76702)
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
seyferth@bsplaw.com
meyers@bsplaw.com
steinberger@basplaw.com

Dated: November 27, 2019

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PRIORITIES USA,

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Case No. 3:19-CV-13188

HONORABLE ROBERT H. CLELAND
MAGISTRATE ANTHONY A. PATTI

BRIEF IN SUPPORT OF THE MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

STATEMENT OF ISSUE PRESENTED

1. The Michigan Legislature has a compelling interest in both the defense of duly enacted statutes and preserving the integrity of Michigan's elections through the same, including the absentee-ballot signature-matching requirement challenged here. This case is brought by the fundraising arm of the nation's largest Democratic Party Super PAC against Michigan Secretary of State Jocelyn Benson, a democrat, represented in her official capacity by the office of Michigan Attorney General Dana Nessel, another democrat. Both Benson and Nessel have made public statements expressing hostility to similar laws and casting doubt on their willingness to defend Michigan laws with which they do not agree. Under these circumstances, should the Michigan Legislature be granted intervention as a matter of right under Rule 24(a)(2), or alternatively permissive intervention under Rule 24(b), to ensure vigorous representation in this case?

The Legislature answers "Yes."

Plaintiff answers "No"

Defendant does not oppose the requested relief

This Court should answer "Yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 24

Michigan Constitution, Art. II, § 4(2)

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

Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999)

INS v. Chadha, 462 U.S. 919 (1983)

Mich State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)

Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell, 467 F.3d 999, 1007 (6th Cir. 2006)

INTRODUCTION

The Michigan Legislature seeks to intervene in this lawsuit to protect Michigan's election-law infrastructure from dismantling by a partisan, out-of-state Super PAC. One of the nation's largest Democratic-Party-affiliated organizations filed this lawsuit (and two successive lawsuits that were filed separately in a transparent display of forum- and judge-shopping) against a Democratic Secretary of State, who could be expected to be—and is—being represented by a Democratic Attorney General, both of whom have made public statements suggesting a lack of genuine opposition to Plaintiff's positions. That, and Secretary Benson's growing track record of coordinating with like-minded plaintiffs to settle litigation for partisan gain, contrary to law and the State's interests, casts justifiable doubt on the vigor with which these claims will be defended. Thus, the Michigan Legislature must intervene to restore the adversarial nature of this litigation and to protect the integrity of Michigan's elections.

On October 30, 2019, Plaintiff Priorities USA—a Washington, DC, 501(c)(4) political action committee closely affiliated with the Democratic Party—filed this lawsuit against Secretary of State Jocelyn Benson, in her official capacity, alleging that the absentee-ballot signature-matching requirements enshrined in Michigan law are unconstitutional. (ECF No. 1). Plaintiff alleges that Michigan's signature-

matching requirement for absentee ballots violates the First and Fourteenth Amendments to the United States Constitutions.

Plaintiff then embarked on a course of judge- and forum-shopping. Instead of one action, Plaintiff intentionally has divided its allegations about Michigan's election-law system into three different lawsuits, of which this is the first-filed. Shortly after this complaint, Plaintiff followed with two more lawsuits:

- On November 12, 2019, Plaintiff filed its second action in the Eastern District of Michigan, asserting that Michigan's prohibitions on hiring vehicles to transport voters and on transporting others' absentee ballots are unconstitutional. The second-filed action, which names as the defendant Attorney General Nessel, in her official capacity, is pending before Judge Goldsmith. (Case No. 2:19-CV-13341, ECF No. 1); and
- On November 15, 2019, Plaintiff filed its third action in the Michigan Court of Claims, alleging that Michigan's statutes requiring new registrations within two weeks of an election occur at a clerk's office and requiring those registering within two weeks of an election to present certain proof of residency violate the Michigan Constitution. (Case No. 19-000191-MZ; Docket No. 1).

The Legislature will also request to participate in the companion cases and to transfer and consolidate the federal companion case. But this case was first-filed and is the appropriate place to begin.

That the three lawsuits are a connected, concerted effort by a partisan organization to dismantle Michigan's election laws is beyond debate. Indeed, in all three suits, Plaintiff relies on overlapping or even identical allegations, such as that it is challenging Michigan's duly enacted laws because Plaintiff "will have to expend and divert additional funds . . . at the expense of its efforts in other states and its other efforts in Michigan." (ECF No. 1, ¶ 19; Case No. 2:19-CV-13341, ECF No. 1, ¶ 6; Case No. 19-000191-MZ, Docket No. 1, ¶ 17). All three actions are brought by the same lead counsel, Marc E. Elias of Perkins Coie. And, if any doubt could remain, it would be dispelled by the public statements of Priorities USA's chairman, Guy Cecil. After filing this first action, Mr. Cecil promised that it was "the first shoe to drop" in Michigan and that there were "[m]ore to come."[1] And, upon the completion of the trilogy, Mr. Cecil released a statement calling the Court of Claims action the "third and final suit in Michigan."[2]

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[1] https://www.detroitnews.com/story/news/politics/2019/10/30/group-sues-michigan-over-checking-absentee-voter-signatures/4097771002/

[2] https://www.mlive.com/public-interest/2019/11/democratic-pac-files-third-lawsuit-challenging-michigan-voting-laws.html

Plaintiff justifies its assault on Michigan law by reference to the purported goal of combatting disenfranchisement. In so doing, however, it unreasonably discounts the critical importance of ensuring that Michigan's elections are free of the taint of actual or even perceived fraud. It is to fulfill its constitutional mandate of preserving the purity of those elections that the Legislature passed the statutes at issue in this and the companion cases. *See* 1963 Mich. Const., Art. II, § 4(2).

Yet, the Legislature's interests are not genuinely represented in this action. Since taking office in January 2019, Secretary Benson has entered swift settlements in election-related cases in lieu of defending Michigan statutes with which she does not agree. Indeed, the court in *League of Women Voters v. Benson* (Case No. 2:17-CV-14148) (the "Redistricting Litigation") held that the Michigan Senate's intervention was proper where "Secretary of State Jocelyn Benson has elected not to defend" the existing Michigan law. (*Id.*, ECF No. 237, p 2). Likewise, in *College Democrats at the University of Michigan, et al. v. Johnson* (Case No. 3:18-CV-12722), Secretary Benson took over a case that had to that point been actively defended, and then promptly entered a settlement that required accommodations around long-standing protections on Michigan's elections. This case has all the hallmarks of another such "sue-and-settle" action. Furthermore, Attorney General Nessel, whose office represents Secretary Benson, actively campaigned, in part, on the promise that she would not defend Michigan laws that she deemed

unconstitutional.[3] Against this backdrop, the reasons to doubt the adequacy of their representation are unavoidable.

Accordingly, the Legislature respectfully requests that the Court grant its Motion to Intervene because:

(1) The Legislature's intervention is timely, with this motion filed before the pleadings are closed and before any scheduling order has been set;

(2) The Legislature has a substantial and particular legal interest in preserving the integrity of duly enacted Michigan statutes and the integrity of Michigan's election system;

(3) The Legislature's ability to protect its interest will be impaired if it does not intervene, particularly given the credible prospect of a rapid capitulation or similar failure to vigorously defend the merits; and

(4) Secretary Benson does not adequately represent the Legislature's interests because she is unlikely to provide the full-throated defense that Michigan law deserves.

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[3] https://www.bridgemi.com/michigan-government/michigan-attorney-general-candidate-dana-nessel-attacked-her-own-words?fbclid=IwAR2jlb4sTHzqwgV6bpwnM9r6mFOR7yq5LI-Oa2NQNX_XtqOA0MokjkVlQ-o

ARGUMENT

The Legislature seeks to intervene in this action under Federal Rule 24(a)(2) or, alternatively, under Rule 24(b)(1). Those rules state, in relevant part:

> (a) **Intervention of Right**. On timely motion, the court must permit anyone to intervene who: . . . (2) 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 represented that interest.
>
> (b) **Permissive Intervention**. (1) On timely motion, the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact.

"Rule 24 traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Because the Legislature's participation is necessary for a full and fair adjudication of this case, the Court should allow the Legislature to intervene as Defendant.

A. The Legislature Should be Granted Intervention as a Matter of Right.

The Sixth Circuit recognizes an "expansive notion of the interest sufficient to invoke intervention of right." *Mich State AFL-CIO v. Miller,* 103 F.3d 1240, 1245 (6th Cir. 1997). To be entitled to intervene as a matter of right, an applicant must show:

(1) the application was timely filed;

(2) the applicant possesses a substantial legal interest in the case;

(3) the applicant's ability to protect its interest will be impaired without

intervention; and

(4) the existing parties will not adequately represent the applicant's interest.

Blount-Hill v. Zelman, 636 F.3d 278, 283 (6th Cir. 2011); *Grutter v. Bollinger,* 188 F.3d 394, 397–98 (6th Cir. 1999). These rules must be "construed broadly in favor of potential intervenors." *Michigan State AFL-CIO,* 103 F.3d at 1246.

1. *The Legislature's Motion to Intervene is timely filed.*

The five factors set forth by the Sixth Circuit in weighing the timeliness of a motion to intervene entirely favor the Legislature. Those factors are:

(1) the stage of the proceedings;

(2) the purpose of the intervention;

(3) the length of time between when the proposed intervenor knew (or should have known) about his interest and the motion;

(4) the prejudice to the original parties by any delay; and

(5) any unusual circumstances militating in favor of or against intervention.

Jansen v. Cincinnati, 904 F.2d 336 (6th Cir. 1990).

These proceedings are in their infancy. Indeed, the pleadings are not even closed, no scheduling conference (much less schedule) has been set, and no development has taken place whatsoever. Therefore, the Legislature is positioned to participate fully throughout the duration of this case. Moreover, as discussed throughout this motion, the Legislature has a compelling purpose in ensuring

vigorous litigation of the disputed issues, in the face of strong reasons to doubt the true adversity of the original parties. And the Legislature has not delayed, electing to file promptly rather than adopting a wait-and-see approach. Because the Legislature is requesting permission to participate from the inception, there is no possible delay or prejudice. Thus, no party can seriously contest this motion's timeliness.

2. *The Legislature has a sufficient interest that may be impaired by the disposition of this case.*

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Michigan State AFL-CIO,* 103 F.3d at 1247. The Legislature need not demonstrate "that impairment will inevitably ensue from an unfavorable disposition; the would-be intervenors need only show that the disposition may impair or impede their ability to protect their interest." *Purnell v. Akron,* 925 F.2d 941, 948 (6th Cir. 1991). And the presumption is in favor of intervention—"close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999).

The United States Supreme Court recognized a legislative body's interest in defending duly enacted laws in *INS v. Chadha*, 462 U.S. 919, 939 (1983); *see also Karcher v. May*, 484 U.S. 72, 75 (1987) (noting a legislature's right to intervene where "neither the Attorney General nor the named defendants would defend the

statute.”). The Supreme Court has “long held that Congress is the proper party to defend the validity of a statue when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional,” which is the likely position of this case in light of Secretary Benson’s party affiliation, her public statements, and the statements of her counsel. *Chadha*, 462 U.S. at 940.

Indeed, cases recognizing a legislative body’s interest in defending the constitutionality of statutes are legion. *See Ne. Ohio Coal. for Homeless & Serv. Employees Int’l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006) (recognizing Ohio Legislature’s right to intervene and defend Voter ID statute when interest “potentially” diverged from defendant Secretary of State); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) (recognizing House of Representatives’ ability to intervene to defend alcohol-labeling statutes); *In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987) (recognizing Congress’s right to intervene to defend Bankruptcy Act); *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986) (“There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the CICA stay provision.”); *Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (“[C]ourts have permitted Congress to intervene as a full party in numerous cases where the Executive Branch declines to enforce a

statute that is alleged to be unconstitutional.")

The Legislature here is situated similarly to the legislative bodies granted intervention as a matter of right in the caselaw above. It seeks to intervene to defend the constitutionality of duly enacted Michigan statutes, in the face of circumstances in which the representation of the defendant charged with enforcement has been called into doubt by prior actions and public statements. Indeed, there are sufficient hallmarks of a conflict of interest in this and the companion cases—actions brought by a partisan organization against members of the same party, aimed squarely at advancing stated policy goals of that party—to erode public confidence in the outcome unless genuine adverse representation is assured.

The nature of the statutes under attack further demonstrates the Legislature's interest in intervention. The Legislature is constitutionally obligated to "enact laws . . . to preserve the purity of elections." 1963 Mich. Const., Art. II, § 4(2). The Legislature has fulfilled that mandate and now seeks to defend the integrity of the very voting laws—in this case, the absentee-ballot signature-matching requirements—under which its members' votes will be counted. Undoubtedly, the members of the Legislature, who all must be elected, have an interest in preserving and protecting the integrity of the elected body. *See Powell v. McCormack*, 395 U.S. 486, 548 (1969) ("Unquestionably, Congress has an interest in preserving its institutional integrity."). That is especially so where the Michigan Constitution

expressly requires the Legislature to enact laws to preserve the purity of elections. Plaintiff seeks to dismantle those statutory protections just before what Plaintiff itself predicts will be a tidal wave of new absentee voting. Absent intervention, the Legislature's strong interest in ensuring that Michigan votes are cast without the taint of fraud would be irreparably harmed.

3. *No current party adequately represents the Legislature's interests*.

Finally, the Sixth Circuit's intervention analysis requires an examination of whether the "present parties . . . adequately represent the applicant's interest." *Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989). Once again, the requirement is not onerous. The prospective intervenor need only show that the representation of its interest "may be inadequate." *Trbovich v. UMW,* 404 U.S. 528, 538, n.10 (1972); *Michigan State AFL-CIO,* 103 F.3d at 1247. This requirement "underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967).

As previewed above, there are strong indications that Secretary Benson (and Attorney General Nessel, as counsel in this case and defendant in the related case) will not adequately represent the Legislature's interests by vigorously defending the challenged statutes. "It has been said that, given this standard, the applicant should be treated as the best judge of whether the existing parties adequately represent his

or her interests, and that any doubt regarding adequacy of representation should be resolved in favor of the proposed intervenors." 6 MOORE'S FEDERAL PRACTICE § 24.03[4][a], at 24-42 (3d ed.) (footnote omitted).

The Sixth Circuit has held that even a potential divergence in interest satisfies this factor of the analysis. "The [Legislature's] burden with respect to establishing that its interest is not adequately protected by the existing party to the action is a minimal one." *Blackwell*, 467 F.3d at 1008. In a voting-law case similar to this one, the Sixth Circuit recognized that the Ohio Secretary of State's "primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced." *Id.* This dichotomy and the Ohio Secretary of State's desire not to defend the Ohio law satisfied the Sixth Circuit that "the interests of the Secretary and the State of Ohio *potentially* diverge," such that intervention was warranted. *Id.* (emphasis added); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) ("It is sufficient for Applicants to show that, because of the difference in interests, it is *likely* that Defendants will not advance the same arguments as Applicants") (emphasis added).

So too here. Secretary Benson and Attorney General Nessel have been outwardly hostile to Michigan's protections against voter fraud and, in general, the notion of defending laws that they do not agree with, demonstrating the need for

intervention. Though they have not taken a public position on the particular statute targeted in this case, their statements on closely linked matters and the related underlying policies reasonably can be extrapolated for this case. Below are just a few of their public statements on these matters:

- "Our democracy in Michigan restricts the rights of the voters." – Attorney General Nessel, March 12, 2019[4]
- "Now more than ever we need Secretaries of State who will guard our democracy against any attempts to suppress or block any eligible citizen from casting their ballot." – Secretary Benson, June 11, 2018[5]
- "I will not waste taxpayer money and embarrass our state by defending flagrantly unconstitutional laws which are summarily overturned by the courts." - Attorney General Nessel, May 29, 2018[6]

These statements mirror the allegations in the Complaint itself. They evidence hostility to the framework of voting laws enacted to protect the integrity of Michigan elections, suggesting that any restrictions on voting (even those that target fraud) are attacks on democracy itself, and arrogate to the Secretary of State and the Attorney General the authority to decide which laws they will enforce and which they will deem—without the need for judicial review—unconstitutional or simply

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[4] https://www.facebook.com/plugins/post.php?href=https%3A%2F%2Fwww.facebook.com%2FDanaNesselAG%2Fposts%2F2235038193491842

[5] https://twitter.com/JocelynBenson/status/1006277385258446853

[6] https://www.facebook.com/plugins/post.php?href=https%3A%2F%2Fwww.facebook.com%2FDanaNesselAG%2Fposts%2F2012274382434892

undesirable. Such statements do not reflect a party that will vigorously defend this lawsuit, and they emphasize the need for the Legislature's intervention.

The Legislature's concerns are further reinforced by the Secretary's actual defense in two other recent actions involving voting issues. In the Redistricting Litigation, the Legislature gave Secretary Benson the benefit of the doubt, waiting to intervene until her positions in that action were explicitly stated in the pleadings. But that restraint backfired and the Legislature's interests were impaired on the eve of trial with a proposed settlement and consent judgment. And in *College Democrats*, Secretary Benson took over the litigation when she assumed office and fundamentally changed the trajectory of the case. Instead of a fulsome defense of Michigan laws that had been on the books for almost 20 years, Secretary Benson stipulated to a dismissal and letter agreement in which she consented to myriad concessions to valid Michigan statutes.

The need for intervention in this case is even more pronounced than in either of the prior cases. There, Secretary Benson took over as the defendant later in the litigation; here, on the other hand, she will guide the litigation from wheels-up to wheels-down, making all strategic decisions. Given the confluence of party allegiance, prior statements sympathetic to Plaintiff's core positions underlying this litigation, and a track record of noncommittal representation in prior voting litigation, the need for a party truly adverse to Priorities USA is apparent. Likewise,

the Legislature's particularized interest as a collection of elected officials in preservation of Michigan duly enacted election laws favors a finding of inadequate representation here. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public.") The Legislature is therefore entitled to intervene as a matter of right in accordance with Federal Rule 24(a)(2).

B. Alternatively, the Legislature is Entitled to Permissive Intervention.

Even if this Court determines that the Legislature is not permitted to intervene as a matter of right, it should be granted permissive intervention under Federal Rule 24(b). This rule provides for permissive intervention where a party timely files a motion and "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).

Intervention under Rule 24(b) is a discretionary power" left to the judgment of the district court. *Bradley v. Milliken,* 828 F.2d 1186, 1193 (6th Cir. 1987). In exercising its broad discretion under this Rule, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).

For all the reasons explained above, the Legislature also has a right to intervene in this matter permissively. Because the case is in its infancy, with the

pleadings open and no schedule (or scheduling conference) set, the request to intervene is timely and no party will be prejudiced by the Legislature's intervention.

On the other hand, not allowing the Legislature to intervene would prejudice its interests and rights. Plaintiff—a partisan, out-of-state organization—attacks duly enacted Michigan laws generally, which the Legislature has a right to defend. *See Blackwell*, 467 F.3d at 1007. Moreover, Plaintiff specifically targets election laws, which the Legislature is constitutionally obligated to enact to preserve the purity of elections. 1963 Mich. Const., Art. II, § 4(2). In addition, the Legislature has a specific interest in protecting from interference to preserve the integrity of the institution. *Powell*, 395 U.S. at 548. To ensure a full and fair adversarial process, the Legislature should be permitted to intervene in this matter as a defendant.

CONCLUSION

For the foregoing reasons, the Legislature respectfully asks that the Court grant its motion to intervene to protect its interests in the integrity of Michigan's voting laws and to ensure a full and fair adjudication of this matter on the merits, following a truly adversarial process.

Respectfully submitted,

BUSH SEYFERTH PLLC
Attorneys for the Michigan Senate and the Michigan House of Representatives

By: /s/ Patrick G. Seyferth
Patrick G. Seyferth (P47475)
Roger P. Meyers (P73255)
Michael K. Steinberger (P76702)
100 W. Big Beaver Rd., Ste. 400
Troy, MI 48084
(248) 822-7800
seyferth@bsplaw.com
meyers@bsplaw.com
steinberger@bsplaw.com

Dated: November 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, I electronically filed the foregoing with the Clerk of the Court using the ECF System, which will send notification to all ECF counsel of record.

By: /s/ Patrick G. Seyferth
Patrick G. Seyferth (P47575)