UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE TULALIP TRIBES OF WASHINGTON

Plaintiff,

v.

STATE OF WASHINGTON; WASHINGTON STATE GAMBLING COMMISSION; CHRISTINE GREGOIRE, Governor of Washington, in her official capacity; and RICK DAY, Director of the Washington State Gambling Commission, in his official capacity.

Defendants.

No. 2:12-CV-688 - RAJ

PLAINTIFF'S RESPONSE TO DEFENDANTS' RULE 19 MOTION TO DISMISS

The State has moved to dismiss this suit pursuant to Federal Rule of Civil Procedure 19 for failure to join required persons. "The moving party has the burden of persuasion in arguing for dismissal" under Rule 19. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The State argues that each of 27 Indian tribes in Washington that have executed amendments to their compacts to include an Appendix X2 is a required party to this suit because each has a

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legally protected interest in the suit and litigating the suit in its absence (1) will impair its ability to protect that interest, and (2) will subject the State to the risk of inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(1). As demonstrated below, the State's Rule 19 arguments are without merit.

1. The 27 Other Tribes Have No Legally Protected Interest in this Suit

The State claims that the 27 other tribes have a legally protected interest in the subject matter of this suit because:

> Each of the tribes, including Tulalip, agreed that their acquisitions and transfers of additional TLS machines would be made *only* pursuant to a plan approved by no less than a majority of the eligible tribes. . . . Now, the Tulalip [Tribes] seeks a court ordered amendment to their Appendix X2 that will alter the tribes' joint agreement.

Mot. to Dismiss at 13 (citing Appendix X2, § 12.2, p. 226). As demonstrated below, this assertion is meritless.

a. Tulalip's Appendix X2 is a *Bilateral* Agreement between Tulalip and the State

The State's argument rests on the false premise that the terms of Appendix X2 represent a contractual agreement, or otherwise create reciprocal rights, among tribes. While the initial terms of Appendix X2 were cooperatively determined by the State and the Washington tribes, each tribe subsequently executed Appendix X2 in an independent bilateral agreement *between itself and the State*. No tribe is party to another tribe's Appendix X2 agreement with the State. Instead, there are 28 separate and independently executed Appendix X2 agreements in effect in the State of Washington.[1]

[1] *See, e.g.*, Tulalip Compact, Signature Page, p. 51. *See also, e.g.*, Appendix X2, pp. 185-86 ("WHEREAS, . . . *the State and Tribe have agreed* to certain optional changes to the Tribal Lottery System that require Appendix X to be supplemented by further amendment known as Appendix X2, NOW, THEREFORE . . . Appendix X2 . . . is added to the IGRA Compact

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Thus, if the 27 other tribes have any legally protected interest in this suit cognizable under Rule 19, that interest must be one that, as the Ninth Circuit has explained, "actually arises from terms in" their *own* Appendix X2 agreements with the State. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 971 (9th Cir. 2008) (quotation marks omitted). The question, then, is whether the actual terms of each independent Appendix X2 confer any right or guarantee on the signatory tribe that the State will refrain from altering or augmenting the terms of the State's *other* separate bilateral Appendix X2 agreements (*e.g.*, its agreement with Tulalip) to which that signatory tribe is a non-party.

Such a right or guarantee can nowhere be found in the terms of Appendix X2. Each Appendix X2 sets forth bilateral promises and obligations between the State and each single signatory tribe. No language in Appendix X2 creates reciprocal promises or obligations involving, or otherwise conferring rights upon, non-parties to the Compact. Section 12.2.2 is a conditioned promise by the signatory tribe *to the State* that the tribe will exercise the specific terminal allocation rights established under Section 12.2 pursuant to a plan approved by a majority of other tribes. It contains no language creating reciprocal obligations among tribes.[2]

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between the Tulalip Tribes of Washington and the State of Washington . . . . IN WITNESS THEREOF, *the Tulalip Tribes of Washington and the State of Washington have executed this Seventh Compact Amendment."* (emphases added)).

[2] The self-evident bilateral nature of the Tulalip-State Appendix X2 agreement is not affected in any way by the "Effective Date" provision of Section 18 providing that Appendix X2 will take effect only after "additional" Appendix X2 amendments are approved between the State and the other Eligible tribes and forwarded to the Department of the Interior. *See* Appendix X2, § 18 (1) and (2), p. 236. These are nothing more than conditions on the effective date of the Appendix X2 agreement between Tulalip and the State. They cannot reasonably be read to create legally protected rights in other tribes. Indeed, both conditions are subject to unilateral waiver by the State at its discretion. *See id.* ("[T]he State may, if it chooses, waive the requirements of subsections (1) and (2) of this Section 18.").

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The Ninth Circuit has made clear that when tribes intend to create reciprocal obligations among non-party tribes in bilateral tribal-state compacts, they must do so expressly, and that the absence of such express language evidences the parties' intent not to create reciprocal obligations among non-party tribes. *See Cachil Dehe Band*, 547 F.3d at 976 n.18 (citing 1999 California Compacts at § 4.3.2.1(a) (finding reciprocal obligations among tribes created by language stating that "*The Tribe agrees with all other Compact Tribes that are parties to compacts having this Section 4.3.2*, that each Non-Compact Tribe in the State shall receive the sum of $1.1 million per year," but finding no reciprocal obligations in the absence of such language (emphasis added))). No such language appears in Section 12.2.2 or anywhere else in Appendix X2. Thus, no reciprocal obligation among tribes creating a legally protected interest at stake in this suit "actually arises from terms in" any Washington tribe's Appendix X2 agreement with the State.

b. The State's Argument Conflicts with the Plain Terms of Appendix X2

Any expectation of the State or other tribes that Tulalip would always and "only" acquire terminal allocation rights pursuant to a majority-approved plan finds no support in the plain terms of the provisions at issue, which are expressly limited in scope and expressly subject to bilateral alteration between Tulalip and the State.

Section 12.2.2 is a sub-provision of, and places a "condition" specifically on, Section 12.2. As such, it requires that the terminal allocation transactions *authorized by Section 12.2* be accomplished "only" pursuant to a plan approved by a majority of Eligible Tribes. *See* Appendix X2, §§ 12.2 and 12.2.2, p. 226. Nothing in the plain terms of Section 12.2 imposes that

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requirement on *other* terminal allocation mechanisms to which the State and a tribe may agree outside of, or in addition to, the current terms of Appendix X2.[3]

Moreover, the actual terms of Appendix X2 make clear that neither the State nor any tribe had a right or reason to expect that its terms would remain unchanged. Section 12.2.2's promise by the signatory tribe to the State that it will exercise its terminal allocation rights under Section 12.2 only pursuant to a majority-approved plan is – like every promise and obligation set forth in Appendix X2 between the State and the signatory tribe – expressly subject to provisions allowing the terms of any tribe's individual Appendix X2 agreement with the State to be altered by bilateral agreement between the two parties to that agreement.

For example, Section 15 of Appendix X2 expressly acknowledges that the signatory tribe may seek "amendments to this Appendix with respect to the subject matter of Tribal Lottery System Terminals" after an amendment moratorium ending on June 30, 2009. Appendix X2, § 15.1, p. 234. Section 15 also expressly preserves the State's and the individual signatory tribe's rights to mutually "amend the terms and conditions" of the Compact at any time. *Id*. at § 15.1.2, p. 234. And Section 12.4 of Appendix X2 expressly recognizes that the State may "agree[] . . . to permit an allocation of Player Terminals to a [different] tribe which is . . . on terms which are more favorable, than as set forth" in Appendix X2 as originally executed, and that in that event, the signatory tribe is also entitled to change its own Appendix X2 terms to incorporate the more favorable terms. *Id.* at § 12.4 (emphasis added), p. 227. Finally, Section 11 provides that "[n]otwithstanding anything in this Appendix to the contrary, *the [State] and Tribe may agree on*

[3] As discussed below, this fact is demonstrated by Appendix Spokane itself. The Spokane Tribe is fully subject to Appendix X2, yet Appendix Spokane permits the Spokane Tribe to utilize terminal allocation procedures in addition to those set forth in Appendix X2 and with no

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alternative provisions to those set forth herein, provided such provisions adequately preserve and protect the integrity and security of any game or gaming system or component, or accounting or auditing system or component, affected thereby." *Id*. at § 11, pp. 224-25 (emphasis added).

In light of such provisions, there simply is no way to interpret Section 12.2.2 or any other provision of Appendix X2 as conferring a right upon non-signatory tribes that the State will never enter into an agreement with a signatory tribe (in this case, Tulalip) amending or otherwise altering Appendix X2's terms with that tribe.

In sum, the tribes that negotiated and agreed to the terms of Appendix X2 agreed to *all* of its terms, including the provisions explicitly acknowledging the permissibility of amendment or other alteration of its terms by bilateral agreement between the State and any single tribe. Had the tribes that collectively negotiated the terms of Appendix X2 intended to set its terms in concrete, they would not have agreed to Sections 15, 12.4 and 11. The State has premised its entire Rule 19 argument on a purported legal interest that simply does not exist under, and indeed is expressly refuted by, the plain terms of Appendix X2.

c. The State's Rule 19 Arguments are Irreconcilable with Appendix Spokane

The State's failure to identify a legally protected interest in this suit on the part of the 27 other tribes is highlighted by its own agreement with the Spokane Tribe. The Inter-Tribal Fund ("ITF") mechanism to which the State agreed with the Spokane Tribe allows that tribe to obtain Player Terminal rights by a mechanism alternative to that provided in Section 12.2 of Appendix X2. The State acknowledges this fact. *See* Mot. to Dismiss at 5 ("The State . . . agreed to provide an alternative mechanism for the Spokane Tribe to obtain TLS machines" beyond the

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requirement of a majority-approved plan. Appendix Spokane, § 7 (Inter-Tribal Fund), pp.302-04.

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terms of Appendix X2). And the alternative ITF mechanism provided in Appendix Spokane unquestionably places no obligation on the Spokane Tribe to utilize it according to a plan approved by a majority of other tribes. *See* Appendix Spokane, § 7 (Inter-Tribal Fund), p. 302-04. Yet the State derides as an unlawful violation of Appendix X2 *these same aspects* of Tulalip's requested relief:

> The Tulalip's proposed amendment . . . violates Appendix X2's requirement of a multi-tribe acquisition and transfer plan. . . . The proposed plan would . . . permit the Tulalip to obtain TLS machines outside the agreement and without the approval of the other tribes. This is directly contrary to the terms of Appendix X2 and should not be permitted.

Mot. to Dismiss at 20 (footnote omitted).

Thus, one of two things must be true: either (1) the State, in having agreed to the Spokane ITF, is presently in acknowledged breach of the compact rights of all tribes in the State of Washington signatory to Appendix X2, or (2) a tribe may obtain terminal allocation rights by a mechanism in addition to that set forth in Section 12.2 without running afoul of the terms of Appendix X2. The State concedes that the latter is the case; by its own admission, "[n]othing in the Appendix Spokane alters the allocation terms set forth in Appendix X2." Mot. to Dismiss at 17.

The State's concession is dictated not only by its need to avoid painting Appendix Spokane as a breach of the other Washington compacts, but also by the clear terms of Appendix X2. As discussed above, the majority-approved plan requirement of Section 12.2.2 is a condition on the exercise of the terminal allocation mechanism *established by Section 12.2*, and nothing in its plain terms suggests that the parties intended it to apply to other terminal allocation mechanisms to which the State and Tribe may agree. Thus, the absence of a majority-approved plan requirement in Tulalip's proposed ITF, like the absence of such a requirement in the

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Spokane ITF, does not violate the allocation terms set forth in Section 12.2. The very existence of Appendix Spokane demonstrates that the State's present motion is not made out of concern for the interests of the other Washington Tribes, but is instead a tactical effort to win dismissal of this case to avoid complying with its clear legal obligations to Tulalip. [4]

2. The Ninth Circuit Cases Cited by the State Do Not Support its Rule 19 Arguments

The State asserts that the 27 other tribes are "[s]imilar to the tribes" found to be necessary parties in *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002), and other Ninth Circuit decisions. *See* Mot. to Dismiss at 13. In fact, no such similarity exists.

In *American Greyhound*, the litigation was "aimed" directly at and sought to terminate all of the absent tribes' own compacts. *See* 305 F.3d at 1023 (relief sought in suit "directs the Governor to give notice of termination of all the compacts"). By contrast, Tulalip's suit seeks only to enforce a provision of its own bilateral agreement with the State. If Tulalip prevails, the terms of other tribes' allocation of Player Terminals will remain unaffected; the tribes will remain entirely free to transfer and acquire Player Terminal allocation rights under Section 12.2

[4] In its proposed amicus brief, the Samish Tribe speculates that Tulalip's request for a mechanism to acquire Player Terminal allocation rights in addition to that provided for in Section 12.2.2 "will eviscerate" that provision. Proposed Amicus Br. at 5. This pure speculation is belied by the absence of any showing that such an evisceration has occurred as a result of Appendix Spokane. It is also belied by the plain terms of Tulalip's proposed ITF, which provides that Player Terminals in excess of the Tribe's base allocation "*must be acquired by securing the allocation rights for such terminals from other Eligible Tribes pursuant to the terminal allocation acquisition and transfer procedures under Appendix X2, Section 12.2.2*," and that Tulalip may access its ITF only "in the event the Tribe is unable, after making reasonable efforts, to acquire allocation rights for some or all of such additional Player Terminals by the procedures set forth in Appendix X2[.]" Attachment 3 to Declaration of Giampetroni (Proposed Compact Amendment, § 12.2.5.1) p. 438. Appendix Spokane similarly requires that the Spokane Tribe must first make reasonable efforts to obtain its additional Player Terminals from other tribes under the existing procedures before accessing its ITF. *See* Appendix Spokane, § 6 (A), p. 301. And again, according to the State, "[n]othing in the Appendix Spokane alters the allocation terms set forth in Appendix X2." Mot. to Dismiss at 17.

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pursuant to a plan approved by a majority of Eligible Tribes, and to invoke the benefits of the MFT clause as Tulalip has done here. Tulalip's suit in no way affects the other tribes' abilities to continue to exercise those or any other rights conferred by Appendix X2.

Judge Canby's distinction between the tribes found to be necessary parties in *American Greyhound* and those found not to be necessary parties in *Cachil Dehe Band* applies with equal force here:

> [U]nlike the plaintiff in *American Greyhound Racing*, Colusa does not seek to invalidate compacts to which it is not a party; this litigation is not "*aimed*" at the other tribes and their gaming. On the contrary, Colusa seeks to enforce a provision of its own Compact which may affect other tribes only incidentally.

Cachil Dehe Band, 547 F.3d at 972 (citation omitted).

The State's citations to other Ninth Circuit cases finding Indian tribes to be necessary parties likewise do not support the State's Rule 19 arguments. Each case, like *American Greyhound* and unlike *Cachil Dehe Band* (and unlike here), was "aimed" at and sought directly to extinguish the legal rights of the absent tribes. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1153 (9th Cir. 2002) (suit sought to invalidate lease agreement to which absent tribe was party); *Clinton v. Babbit*, 180 F.3d 1081, 1086 (9th Cir. 1999) (same); *Makah Indian Tribe*, 910 F.2d at 556-58 (suit sought to decrease absent tribes' allocated shares of finite natural resource); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (suit sought "a complete rejection of the [absent] Quinault Nation's current status as the exclusive governing authority of the reservation").

Nowhere in its motion or supporting papers does the State substantively explain how the relief requested by Tulalip will impair the interests of the other tribes in a manner even remotely

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analogous to the circumstances of the cases cited above. The State's motion instead boils down to the bare notion that each of those tribes is a party to similar Appendix X2 agreements with the State and as such has an interest in how Tulalip's own agreement is interpreted. But the fact that other tribes are parties to their own bilateral agreements with the State with similar, or even identical, terms does not establish any legal interest in how the State and Tulalip implement their own separate bilateral agreement. The Ninth Circuit confirmed this point emphatically in *Cachil Dehe Band*.

There, approximately 60 tribes had collectively negotiated and separately entered "virtually identical bilateral compacts" with the State of California in 1999. 547 F.3d at 966. The Cachil Dehe Band ("Colusa") subsequently sued the State without joining the other tribes on several issues under the compact, including Colusa's entitlement to a refund of fees paid into "a revenue-sharing mechanism for the benefit of California's non-gaming tribes." *Id*. at 967. The State of California moved for dismissal under Rule 19, arguing – precisely as the State argues here – "that Colusa's success in obtaining its refund would impair the [other] Compact Tribes' ability to protect their interest in 'the 1999 Compact's interpretation and the fulfillment of its terms by all 1999 Compact tribes.'" *Id*. at 976. Judge Canby rejected the argument in terms directly applicable here:

> The State's argument sweeps much too broadly. Nothing in the Compact establishes any obligation towards the other Compact Tribes insofar as the payment or refundability of Colusa's advance fees into the Revenue Fund are concerned. With respect to the pre-payment provision, the 1999 Compacts are quintessentially bilateral. *Accordingly, the Compact Tribes' relevant Rule 19 interest must arise, if at all, from the bare fact that the Compact Tribes are simultaneously parties to identical bilateral compacts with the State. We have never held that the mere coincidence of parallel and independent contractual obligations vis-a-vis a common party requires joinder of all similarly situated parties.*

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Id. (footnote omitted) (emphasis added).

Like the compacts at issue in *Cachil Dehe Band*, Appendix X2 establishes quintessentially bilateral obligations between the State and each signatory tribe. Nothing in Appendix X2 establishes any reciprocal obligations among the various tribes regarding whether or how any individual tribe might exercise its rights under Appendix X2. Instead, as noted, Appendix X2 expressly contemplates bilateral alteration of its terms between the State and any individual tribe. *See* Appendix X2, §§ 11, 12.4 and 15, pp. 224-25, 227, 234. *See also Kennedy v. U.S. Dep't of Interior*, 282 F.R.D. 588, 597 (E.D. Cal. 2012) (*Cachil Dehe Band* "stands for the unremarkable proposition that a stranger to a contract is not a necessary party to a contractual dispute even if that stranger entered into a substantially similar, or even identical, contract as well").

San Pasqual Band of Mission Indians v. California, 2007 WL 935578 (S.D. Cal. March 20, 2007), also involved the California 1999 Model Compacts. There, a tribe sued the State seeking an increase in its allocation of gaming device licenses. *Id*. at *1. The State moved to dismiss under Rule 19 for failure to join the other California tribes, arguing, precisely as the State argues here:

> [T]he State bargained with all [1999] Compact tribes, individually and collectively, for a limitation on the total number of Gaming Device licenses [so] the State is entitled to have a judgment that includes all Compact tribes.
>
> . . . While Compacts are nominally bilateral . . . . [e]ach Compact is one of sixty-two virtually identical, mutually interdependent Compacts that represent an integrated agreement amongst the State and all signatory tribes . . . . The uniform term establishing the maximum number of Gaming Device licenses available statewide under the 1999 Compact appears in all 1999 Compacts.

Id. at *8-*9 (quoting State's motion papers).

The district court accepted the State's reasoning, finding that "the absent parties have a

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legally protected interested in the suit . . . inasmuch as a determination of the maximum number of licenses available collectively to all the 1999 Compact tribes is uniformly applicable to all through a formula common to all those Compacts." *Id*. at *11. The Ninth Circuit reversed, finding that the district court abused its discretion because *Cachil Dehe Band* foreclosed the district court's reasoning. *See San Pasqual Band of Mission Indians v. California*, 295 Fed. Appx. 880, 881 (9th Cir. 2008) ("In *Cachil Dehe Band*, we held that an Indian tribe . . . may proceed to litigate [the common terms of the 1999 Compact] without joining other compacting tribes, because those tribes have no legally protected interest . . . within the meaning of Rule 19(a). That ruling controls . . . .").

In sum, the State has failed to identify any legally protected interest held by the 27 other tribes requiring their joinder in this lawsuit.[5]

3. The State Will Not be at Risk of Inconsistent Obligations if the Suit Proceeds without the 27 Other Tribes

The State argues that if the Court grants Tulalip's requested relief in absence of the 27 other tribes, "the State almost surely would be subject to further litigation with the other tribes to enforce the terms of Appendix X2 with respect to their TLS machine allocations and acquisition

[5] The Samish Tribe asserts a financial interest in this suit: "the Samish Tribe believes that the payments it might theoretically receive from Tulalip's proposed [ITF] option would be substantially less than it receives by 'direct' leasing agreements between Eligible Tribes." Proposed Amicus Br. at 11. Under the settled law of the Ninth Circuit, this speculative possibility of a future financial impact does not establish a Rule 19 interest. "A crucial premise of mandatory joinder [under Rule 19] . . . is that the absent tribes possess an interest in the pending litigation that is 'legally protected.' . . . *[W]e have recognized that the 'interest must be more than a financial stake, and more than speculation about a future event.'*" *Cachil Dehe Band*, 547 F.3d at 970 (emphasis added) (*quoting Makah Indian Tribe*, 910 F.2d at 558). And while neither the State nor the Samish Tribe has explained how Tulalip's proposed ITF would work to any other tribe's financial disadvantage, "[t]he mere fact that the outcome of [this] litigation may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties" under Rule 19. *Id*. at 971.

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abilities. Such litigation, if decided adversely to the State, would leave it exposed to 'double, multiple, or otherwise inconsistent obligations' by reason of the tribes' interests in this litigation." Mot. to Dismiss at 13 (quoting Fed. R. Civ. P. 19(a)(1)(B)(ii)).

As the Ninth Circuit has firmly held, Rule 19 protects parties against inconsistent obligations; it does not protect them against inconsistent subsequent adjudications or results:

> "[I]nconsistent obligations" are not . . . the same as inconsistent adjudications or results. . . . Accordingly, the possibility that the State may have to [comply with a plaintiff tribe's interpretation of a compact] while adhering to a different interpretation of the Compact in its dealings with some other tribes does not, without more, rise to the level of creating a "substantial risk" of incurring "inconsistent obligations."

Cachil Dehe Band, 547 F.3d at 976 (quotation marks omitted). *See also id*. at 972 n.12.

Moreover, the State's argument in this regard falls flat in light of the fact that its agreement to permit the Spokane Tribe to obtain additional machines outside of the Appendix X2 process and without the majority approval of the other tribes has not generated such litigation in the past five years, let alone any inconsistent obligations.

4. Rule 19(b)

Tulalip does not address the factors under Rule 19(b) to determine whether a party is indispensable because the State has identified no legally protected interest of the absent tribes that renders them necessary parties under Rule 19(a). *See Makah Indian Tribe*, 910 F.2d at 559.

5. Conclusion

For the reasons stated above, Tulalip respectfully requests that the Court deny the State's Rule 19 motion to dismiss.

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Respectfully submitted,

Dated: December 17, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2012, I electronically filed this Response to Defendants' Rule 19 Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

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