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11  
12 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

13 )  
14 Navajo Nation, )

15 Plaintiff, )

16 v. )

17 United States Department of the Interior, )  
18 et al., )

19 Defendants. )  
20 \_\_\_\_\_ )  
21 )  
22 )

No. CV-03-507-PCT-GMS

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF NAVAJO  
NATION’S RENEWED  
MOTION FOR LEAVE TO  
FILE THIRD AMENDED  
COMPLAINT**

1 Pursuant to the Court’s *Order* (Dec. 11, 2018) (Doc. 359) (“Order”) and Rule  
2 15(a)(2) of the Federal Rules of Civil Procedure, the Plaintiff Navajo Nation files this  
3 memorandum of points and authorities in support of the *Navajo Nation’s Renewed*  
4 *Motion for Leave to File Third Amended Complaint* (Jan. 10, 2019) (“Motion”). The  
5 proposed *Third Amended Complaint for Declaratory and Injunctive Relief* (“Proposed  
6 TAC”) is attached as **Exhibit 1** to the Motion.<sup>1</sup> For the reasons stated below, the Court  
7 should grant leave to file the Proposed TAC.

8 The Ninth Circuit remanded this matter for the Court “to consider fully the  
9 Nation’s breach of trust claim in the first instance, after entertaining any request to amend  
10 the claim to more fully flesh it out.” *Navajo Nation v. Dep’t of Interior*, 876 F.3d 1144,  
11 1173 (9th Cir. 2017). Pursuant to that mandate, the Navajo Nation moves to amend its  
12 breach of trust claim to clarify that it is premised on the failure of the United States to  
13 deliver on its solemn promise and fiduciary duty to make productive the trust lands of the  
14 Navajo Nation in Arizona. The Nation’s Reservation lacks water supplies and water  
15 infrastructure that most Americans take for granted. Yet the United States has not only  
16 failed to determine the needs of the Nation for water to make its Reservation a permanent  
17 homeland for Navajo people, but has made decisions that advance State interests,  
18 including those of the Defendant-Intervenors, over those of the Navajo Nation, and that  
19 induce reliance on limited water supplies by those interests to the detriment of the Navajo

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21 <sup>1</sup> As required by Rule 15.1(a) of the Local Rules of Civil Procedure, a copy of the  
22 Proposed TAC showing the amendments in strikethrough and underline is attached as  
**Exhibit 2** to the Motion.

1 Nation. The Nation is not seeking from this Court a determination of its water rights in  
2 the Colorado River or any other source. Quantification of those rights must wait for  
3 another day. However, it is impossible to adequately describe the breaches by the United  
4 States of its fiduciary duty to the Nation for its lands in Arizona without referencing the  
5 Law of the River, including the litigation in *Arizona v. California*, and the actions of the  
6 United States that make water supplies available to others that could be used to meet the  
7 Nation's needs.

### 8 I. BACKGROUND

9 The Navajo Nation filed this suit in 2003 against the United States Department of  
10 the Interior, Secretary of the Interior ("Secretary"), Bureau of Reclamation, and Bureau  
11 of Indian Affairs (collectively "Federal Defendants") to challenge certain Colorado River  
12 management programs under the National Environmental Policy Act ("NEPA"), 42  
13 U.S.C. §§ 4321 to 70m-12, and bring a related breach of trust claim. *See Complaint for*  
14 *Declaratory and Injunctive Relief* (Mar. 14, 2003) (Doc. 1). Following a ten-year stay of  
15 this proceeding and two minor amendments to the original complaint, *see Second*  
16 *Amended Complaint for Declaratory and Injunctive Relief* (Nov. 14, 2013) (Doc. 281)  
17 ("Second Amended Complaint"), the Court dismissed the NEPA claims for lack of  
18 standing and the breach of trust claim as barred by sovereign immunity. *Order* (July 22,  
19 2014) (Doc. 305); *see Order* (Oct. 1, 2014) (Doc. 319).

20 On appeal, the Ninth Circuit affirmed the Court's dismissal of the NEPA claims,  
21 *Navajo Nation*, 876 F.3d at 1160-67, but reversed its dismissal of the breach of trust  
22 claim. *Id.* at 1167-73. The Ninth Circuit held that section 702 of the Administrative

1 Procedure Act, 5 U.S.C. § 702, waived the Federal Defendants’ sovereign immunity, so it  
2 remanded and directed this Court “to consider the claim on its merits, after entertaining  
3 any request to amend it.” *Navajo Nation*, 876 F.3d. at 1174.

4 In April 2018, the Navajo Nation sought leave to amend the Second Amended  
5 Complaint to fully flesh out the breach of trust claim. *See Memorandum of Points and*  
6 *Authorities in Support of Navajo Nation’s Motion for Leave to File Third Amended*  
7 *Complaint* (Apr. 13, 2018) (Doc. 335-1) (“April 2018 Memorandum”); *Third Amended*  
8 *Complaint for Declaratory and Injunctive Relief* at 54 (Apr. 13, 2018) (Doc. 335-2)  
9 (“2018 TAC”). The Federal Defendants did *not* oppose the Navajo Nation’s proposed  
10 amendments concerning the breach of trust claim, *Federal Defendants’ Response in*  
11 *Partial Opposition to Plaintiff’s Motion for Leave to File Third Amended Complaint* at 2  
12 (May 25, 2018) (Doc. 339) (“US Response”), but objected to the addition of what they  
13 called two new claims and to what they perceived as a renewed attack against the  
14 Colorado River management programs. *Id.* at 12-17. The Defendant-Intervenors  
15 opposed leave to amend entirely, arguing that the Supreme Court retained exclusive  
16 jurisdiction over the subject matter in the *Arizona v. California* litigation. *Opposition of*  
17 *the Intervenor-Defendants the Metropolitan Water District of Southern California,*  
18 *Coachella Valley Water District, Imperial Irrigation District, and State of Arizona to*  
19 *Plaintiff’s Motion for Leave to File Third Amended Complaint* at 9-14 (May 25, 2018)  
20 (Doc. 340).

21 The Court set this matter for a hearing on November 14, 2018. *Order* (Oct. 31,  
22 2018) (Doc. 348). In addition to the issues raised in the briefs, the Court ordered the

1 parties to be prepared to address

2 specifically whether this Court could grant the relief as requested in  
3 Plaintiff's two prayers for relief . . . without making a determination that  
4 the Plaintiffs have a current right to water in the mainstream of the  
Colorado River and thus infringing upon the jurisdiction reserved by the  
Supreme Court in *Arizona v. California*, 547 U.S. 150, 166-67 (2006).

5 *Id.*

6 At the hearing, the Navajo Nation explained that it was not asking the Court to  
7 make a water rights determination that would implicate the Supreme Court's retained  
8 jurisdiction in *Arizona v. California*, and instead sought an order requiring the Federal  
9 Defendants to determine and address the Navajo Nation's need for water from the Lower  
10 Colorado River to serve the Navajo Reservation. *See Reporter's Transcript of*  
11 *Proceedings Motion Hearing* at 5-21 (Nov. 14, 2018). In the Navajo Nation's view, this  
12 relief did not require the Court to determine the existence of any water rights in the  
13 Lower Colorado River, as the Federal Defendants would make that determination in the  
14 first instance. *Id.* at 14-15.

15 The Federal Defendants took no position on the Supreme Court's jurisdiction, *see*  
16 *id.* at 22-23, but ignoring the Navajo Nation's interests in its reservation lands, argued  
17 that the Nation lacks the necessary interest in a trust property for a breach of trust to  
18 arise.<sup>2</sup> *Id.* at 23-28. The Defendant-Intervenors continued to maintain that the Court

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19  
20 <sup>2</sup> The lands comprising the Navajo Reservation are held in trust by the United States on  
21 behalf of the Navajo Nation, and such lands constitute the trust corpus with respect to the  
22 breach of trust claim. The Federal Defendants did not argue in the US Response that the  
Navajo Nation's 2018 TAC identified no trust resources and that they owed no duty of  
trust to the Navajo Nation. The argument before the Court not only exceeded the grounds

1 cannot provide the requested relief to the Navajo Nation without infringing on the  
2 Supreme Court’s exclusive jurisdiction. *Id.* at 29-32.

3 The Court appeared willing to consider the Navajo Nation’s general need for  
4 water, without regard for where it came from, as well as the Federal Defendants’ failure  
5 to address that need, *see id.* at 15 (“I’m willing to consider determining the needs of the  
6 Navajo Nation for water, and even determining . . . whether or not the United States has  
7 made adequate provision for those needs”), but ultimately found that, as written, the  
8 prayers for relief required it to determine whether the Navajo Nation has water rights in  
9 the Colorado River. Order at 4-6. This, the Court held, “is beyond [its] authority because  
10 of the Supreme Court’s reserved jurisdiction in *Arizona v. California.*” *Id.* at 4.

11 The Court, however, offered the Navajo Nation “one last chance to file an  
12 amended complaint asserting a breach of trust claim consistent with this Order.” *Id.* at 9.  
13 Accordingly, the Navajo Nation now requests leave to file the Proposed TAC, as  
14 amended, consistent with the Court’s Order.

## 15 II. LEGAL STANDARD

16 Rule 15 requires federal courts to “freely give leave” to amend pleadings “when  
17 justice so requires.” FED. R. CIV. P. 15(a)(2). Courts must apply this policy ““with  
18 extreme liberality,”” *Navajo Nation*, 876 F.3d at 1173 (quoting *Morongo Band of Mission*  
19 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)), and ““be guided by the underlying

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21 \_\_\_\_\_  
22 set forth in the US Response, but is patently false, unconscionable, and indicative of how  
far the Federal Defendants will go to avoid their trust responsibilities.

1 purpose of Rule 15—to facilitate decision on the merits, rather than on the pleadings or  
2 technicalities.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)  
3 (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)).

4 In determining whether to grant leave to amend, the Supreme Court requires  
5 district courts to consider whether: (1) the moving party unduly delayed; (2) the moving  
6 party acted in bad faith; (3) the non-moving parties will be unfairly prejudiced; and (4)  
7 the proposed amendments are futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); see  
8 Order at 2. Courts perform this determination “with all inferences in favor of granting”  
9 leave, *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999), and if no  
10 reason exists to deny it, “the leave sought should, as the rules require, be ‘freely given.’”  
11 *Foman*, 371 U.S. at 182.

12 While “courts have particularly broad discretion to deny leave to amend if the  
13 plaintiff has already amended its complaint,” Order at 2 (citing *Sisseton-Wahpeton Sioux*  
14 *Tribe of Lake Traverse Indian Reservation v. United States*, 90 F.3d 351, 355 (9th Cir.  
15 1996) (per curiam)), here the Court should bear in mind that the Navajo Nation has never  
16 amended its breach of trust claim in the fifteen years since it filed this case.<sup>3</sup> In addition,  
17 the Ninth Circuit’s remand order called for this Court “to consider the claim on its merits,  
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19 <sup>3</sup> In the past, the Federal Defendants challenged the breach of trust claim primarily on  
20 sovereign immunity grounds, and since no additional allegations would have resolved  
21 that purely legal issue, the Navajo Nation did not seek leave to amend the claim. See  
22 April 2018 Memorandum at 2-4. The Navajo Nation had no reason to believe the Court  
lacked jurisdiction over the breach of trust claim following the Ninth Circuit’s remand  
order, so its proposed amendments in April 2018 were simply to update the claim and  
flesh it out, as the Ninth Circuit contemplated. *Navajo Nation*, 876 F.3d at 1173.

1 after entertaining any request to amend it.” *Navajo Nation*, 876 F.3d at 1174. A district  
2 court is bound by the mandate in a remand order. *See United States v. Thrasher*, 483  
3 F.3d 977, 981-82 (9th Cir. 2007) (reciting law of the case and rule of mandate doctrines).

4 **III. ARGUMENT**

5 The Navajo Nation requests leave to file the Proposed TAC to ensure that the  
6 prayers for relief do not infringe on the Supreme Court’s retained jurisdiction in *Arizona*  
7 *v. California*. Granting leave to amend will also further the purposes of Rule 15 by  
8 serving justice and enabling a decision on the merits, which the Ninth Circuit’s remand  
9 order expressly requires. Lastly, none of the four *Foman* factors for denying leave to  
10 amend applies here.

11 **A. THE AMENDED PRAYERS FOR RELIEF DO NOT INVOKE THE  
12 SUPREME COURT’S RETAINED JURISDICTION.**

13 The prayers for relief in the Proposed TAC do not invoke the Supreme Court’s  
14 retained jurisdiction in *Arizona v. California*.<sup>4</sup> This court found that the Supreme Court  
15 reserved exclusive jurisdiction over “any claim that requires any determination of rights  
16 to the [Colorado River].” Order at 4. The Nation’s claims in the Proposed TAC require  
17 no such determination. The Navajo Nation seeks an order requiring the Federal  
18 Defendants to (1) determine the extent to which the Nation requires water from sources  
19 other than the Little Colorado River to enable its Reservation in Arizona to serve as a

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20  
21 <sup>4</sup> The Navajo Nation does not concede that the rejected 2018 TAC would have required  
22 this court to infringe on the Supreme Court’s jurisdiction in *Arizona v. California* or to  
determine the extent of its rights in the Colorado River, but seeks here to eliminate any  
confusion over those issues.



1 permanent homeland for the Navajo Nation and its members; (2) develop a plan to secure  
2 the needed water; and (3) utilize their authorities, including those related to the  
3 management of the Colorado River,<sup>5</sup> in a manner that does not interfere with the plan to  
4 secure the water needed by the Navajo Nation. Proposed TAC at First Prayer for Relief.

5 This prayer for relief contrasts with the previously requested relief requiring the  
6 Federal Defendants to determine and address the Navajo Nation's water needs that cannot  
7 be met from the Little Colorado River and on-reservation groundwater supplies and to  
8 seek to meet those needs from the mainstem of the Lower Colorado River. *Compare id.*  
9 *with* 2018 TAC at 54. While the relief the Navajo Nation seeks here requires the Federal  
10 Defendants to investigate the Colorado River, as well as other potential sources of water  
11 in the Lower Basin and elsewhere, the Proposed TAC does not ask the Court to make a  
12 determination of whether the Navajo Nation has any water rights in the Colorado River.  
13 To be sure, the Federal Defendants have certain unique obligations to the Navajo Nation  
14 on the Colorado River, stemming from both the United States' representations in *Arizona*  
15 *v. California* and the language in Article VII of the 1922 Colorado River Compact  
16 preserving the United States' obligations to Indian Tribes with respect to managing the  
17 Colorado River. However, under the Proposed TAC, the determination of how and  
18 where to satisfy the Navajo Nation's needs will be left to the Federal Defendants and not  
19 limited to the Lower Colorado River.

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21 <sup>5</sup> While Lower Colorado River "water is pervasively managed [and] regulated" by the  
22 Federal Defendants pursuant to "The Law of the River," *Navajo Nation*, 876 F.3d at  
1153, the Federal Defendants do not control tributary waters. *Arizona v. California*, 373  
U.S. 546, 567-75 (1963).

1           Importantly, the Federal Defendants’ duty to determine and address the Navajo  
2 Nation’s water needs and make efforts to satisfy them does not arise from a right, or even  
3 a potential right, to the Colorado River. Instead, the duty arises from well-established  
4 law, including treaties with the Navajo Nation, imposing a fiduciary duty on the United  
5 States with respect to the resources it holds in trust for the Navajo Nation. *See* Letter  
6 from Leo M. Krulitz, Department Solicitor, to James W. Moorman, Assistant Attorney  
7 General (Nov. 21, 1978), attached as an appendix to *Brief for Respondents, United States*  
8 *v. Mitchell*, 445 U.S. 535 (1979) (No. 78-1756), 1979 WL 199447 (“The government has  
9 fiduciary duties of care and loyalty, to make trust property income productive, to enforce  
10 reasonable claims on behalf of Indians, and to take affirmative action to preserve trust  
11 property.”). In this case, those trust resources are the *lands* of the Navajo Indian  
12 Reservation. The duty to secure water to preserve such lands and make them productive  
13 arises regardless of whether or not the Nation has rights to the Colorado River.<sup>6</sup>

14 **B. LEAVE TO AMEND WILL SERVE JUSTICE AND FACILITATE A**  
15 **DECISION ON THE MERITS CONSISTENT WITH THE NINTH**  
16 **CIRCUIT’S REMAND ORDER.**

17           Since the amended prayers for relief in the Proposed TAC do not tread on the  
18 Supreme Court’s retained jurisdiction in *Arizona v. California*, the Court should allow the  
19 Navajo Nation to amend its complaint consistent with the policy embodied in Rule 15

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20 <sup>6</sup> *Contra* Order at 5 (“The Nation’s Proposed TAC . . . would require that this Court  
21 determine that the Nation *may* have rights to the river, and thus the United States *may*  
22 may have breached its trust duties. But a request for a determination that the United States  
may have breached its trust to the Nation does not constitute a case or controversy under  
the Constitution.”).

1 and the Ninth Circuit’s remand order in *Navajo Nation*. Again, Rule 15 requires the  
2 Court to “freely give leave” to amend a pleading “when justice so requires,” FED. R. CIV.  
3 P. 15(a)(2), and to facilitate decisions on the merits. *See DCD Programs*, 833 F.2d at  
4 186. And in remanding the breach of trust claim, the Ninth Circuit directed this Court “to  
5 consider the claim on its merits.” *Navajo Nation*, 876 F.3d at 1174.

6 Here, justice requires the Court to grant leave to amend. The Navajo Nation is a  
7 federally recognized Indian tribe in desperate need of a long-term and sustainable water  
8 supply to serve the Navajo Reservation, and the United States has a solemn trust  
9 obligation to address that need. *See* 25 U.S.C. § 1632(a)(5) (“it is in the interest of the  
10 United States, and it is the policy of the United States, that all Indian communities and  
11 Indian homes, new and existing, be provided with safe and adequate water supply  
12 systems . . . as soon as possible”); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S.  
13 545, 576 (1983) (noting “the distinctive obligation of trust incumbent upon the  
14 Government in its dealings with these dependent and sometimes exploited people.”  
15 (quoting *United States v. Mitchell*, 463 U.S. 206 (1983))). To date, however, the Federal  
16 Defendants have failed to take their responsibilities seriously and, in fact, have repeatedly  
17 blocked the Navajo Nation’s attempts to obtain water. *See Navajo Nation*, 876 F.3d at  
18 1156 (“The Nation has in the last half-century repeatedly asserted its right to water in the  
19 Lower Colorado, but its potential water rights in the Lower Colorado have never been  
20 adjudicated or quantified.”); *id.* at nn.13-14 (noting both the United States’ successful  
21 effort to prevent the Navajo Nation from intervening in *Arizona v. California* and the  
22 Secretary’s refusal to contract with the Navajo Nation for Central Arizona Project water).

1 The Federal Defendants continue their obstructionist behavior in this litigation.

2 A grant of leave to amend will also comply with the Ninth Circuit's direction to  
3 this Court to consider the breach of trust claim "on the merits." *Navajo Nation*, 876 F.3d  
4 at 1174. Jurisdictional rulings are not on the merits. *See Williams v. United Airlines,*  
5 *Inc.*, 500 F.3d 1019, 1021 (9th Cir. 2007) (upholding "dismissal of the action not on the  
6 merits but because the district court lacked jurisdiction"); FED. R. CIV. P. 41(b)  
7 (involuntary dismissal "for lack of jurisdiction" is not "an adjudication on the merits").  
8 Jurisdiction, rather, is a threshold issue concerning a court's authority to reach the merits.  
9 *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Thus, by ordering  
10 this Court to decide the merits of the Navajo Nation's breach of trust claim, the Ninth  
11 Circuit necessarily implied that this Court has subject matter jurisdiction. The district  
12 court cannot revisit this determination. *See Thrasher*, 483 F.3d at 981 (law of the case  
13 doctrine applies when appellate court decides issue in question either "explicitly or by  
14 necessary implication"); *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988)  
15 (appellate court's "implicit determination that the district court lacked subject matter  
16 jurisdiction is the law of the case").

17 The Ninth Circuit fully understood that the Navajo Nation, in its Second Amended  
18 Complaint, sought water from the Lower Colorado River to satisfy its needs. *See Navajo*  
19 *Nation*, 876 F.3d at 1164 ("In addition to its unadjudicated *Winters* rights, the Nation  
20 articulated a different interest—a generalized interest in availability for its use of water in  
21 the Lower Basin."); Second Amended Complaint at 33, 36. The Defendant-Intervenors  
22 also presented their argument to the Ninth Circuit that the Supreme Court's exclusive

1 jurisdiction over water rights in the Lower Colorado River precluded the requested relief  
2 in relation to the Navajo Nation’s breach of trust claim, *Response Brief of Intervenors-*  
3 *Defendants-Appellees Coachella Valley Water District, Imperial Irrigation District, and*  
4 *the Metropolitan Water District of Southern California* at 50-56, *Navajo Nation*, No. 14-  
5 16864 (9th Cir. Mar. 16, 2015), but still the Ninth Circuit remanded and ordered a  
6 decision “on the merits.” *Navajo Nation*, 876 F.3d at 1174. While the Ninth Circuit  
7 contemplated the potential amendment of the breach of trust claim to “more fully flesh it  
8 out,” *id.* at 1173, it never suggested that this Court lacked jurisdiction, as some of the  
9 Defendant-Intervenors had argued. The terms of the remand order necessarily imply  
10 otherwise.

11 In any event, the Proposed TAC does not present the issue of whether the Navajo  
12 Nation has rights to water from the Lower Colorado River. Nor does it ask that the  
13 Navajo Nation’s need for water, in addition to that available from the Little Colorado  
14 River, be satisfied solely from the Lower Colorado River. There can be no dispute that  
15 the Proposed TAC does not invoke the Supreme Court’s retained jurisdiction.

16 As shown, justice requires that the Navajo Nation be allowed an opportunity to  
17 amend its breach of trust claim for the first time. Given the important tribal interests at  
18 stake and the Federal Defendants’ related trust obligations, the Court should freely grant  
19 leave to amend the Second Amended Complaint. Such leave is also consistent with the  
20 Ninth Circuit’s remand order.

1 **C. NONE OF THE *FOMAN* FACTORS SUPPORT THE DENIAL OF LEAVE**  
2 **TO AMEND.**

3 The Navajo Nation did not unduly delay or act in bad faith, the Federal  
4 Defendants and Defendant-Intervenors will not be prejudiced, and the proposed  
5 amendments are not futile, so the Court should grant leave to file the Proposed TAC. *See*  
6 *Foman*, 371 U.S. at 182. Since the Court previously denied leave to amend solely on  
7 jurisdictional grounds and without relying on any of the *Foman* factors, the Navajo  
8 Nation incorporates by reference its prior arguments related to those factors and does not  
9 repeat them here. *See* April 2018 Memorandum at 10-15.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Navajo Nation respectfully requests the Court to  
12 grant it leave to file the Proposed TAC.

13 Respectfully submitted this 10th day of January, 2019.

14 By: /s/ Alice E. Walker  
15 Alice E. Walker

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 10th, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CE/ECF registrants:

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