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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation, Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	No. 09-CV-00018-RMP FEDERAL DEFENDANTS' CONSOLIDATED RESPONSE TO PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AGAINST CERTAIN ALLOTTEE DEFENDANTS (ECF NO. 433) AND MOTION FOR SUMMARY JUDGMENT AGAINST CERTAIN INDIVIDUAL ALLOTTEES (ECF NO. 439)

I. INTRODUCTION

The motion for ejectment must be decided on its merit rather than on a fictitious record concocted via defaults and purported admission. Mill Bay asks that the Court enter default judgment against nineteen allottees whose defaults were entered back in 2009, and to enter summary judgment against another nine allottees who failed to answer untimely requests for admission propounded by Mill Bay. Both of Mill Bay's motions fail for multiple reasons, including one simple

reason: Mill Bay lacks a viable claim for estoppel against the individual Indian allottees.

Moreover, assuming *arguendo* that such a claim was somehow viable, there is no basis for entering default judgment under Rules 54 and 55 when the United States has represented the individual Indian allottees' collective trust interests, nor can summary judgment be entered based upon some allottees' failure to respond to untimely requests for admission. Legal gamesmanship purporting to establish a claim in equity must not be allowed to defeat the meritorious motion for ejectment.

II. LEGAL ANALYSIS

A. Mill Bay is not entitled to default judgment against the allottees.

Mill Bay's motion for default judgment should be denied for three reasons. First, Rule 54(c) precludes entry of default judgment because Mill Bay did not plead an equitable estoppel claim against the allottees in its Complaint. Second, even if Mill Bay had pled such a claim, it is not entitled to default judgment because it has no cause of action for estoppel against the allottees as a matter of law. Third, even if an estoppel claim against the allottees is somehow viable – it is not – a ruling on the motion for default should be deferred in the exercise of the Court's discretion until final judgment is decided with respect to all the well represented parties on both sides of this litigation.

1. Rule 54(c) precludes entry of default judgment because Mill Bay did not plead equitable estoppel against the individual allottees.

Mill Bay is seeking default judgment on what they characterize as an "affirmative claim" for equitable "estoppel" under Washington state law against the individual allottees. ECF No. 433 at pp. 6, 8-9. A review of the Complaint, however, reveals Mill Bay did not plead an estoppel claim against the individual allottees. While the Complaint does contain an estoppel claim, the claim is only

asserted against the *Bureau of Indian Affairs* ("BIA"). Virtually every paragraph devoted to this cause of action names the BIA—and not the individual allottees—as the party against whom the claim is asserted:

CLAIMS FOR RELIEF

Estoppel

164. Plaintiffs reallege the preceding paragraphs and incorporate herein by reference.

165. The **BIA** was authorized to bind the Allottees to the Master Lease and any modification or plans related to that lease.

166. The **BIA** was authorized to bind the United States in regards to the leasing of MA-8 as land owned by the United States in trust for the benefit of the Allottees.

167. The **BIA** agents who negotiated, executed, modified, and otherwise managed the Master Lease acted within the scope of their authority when they acknowledged the validity of renewal and modified the terms of the Master Lease through their subsequent actions and omissions.

168. The **BIA** was the sole signatory and supervisor of the Master Lease for over 20 years, never seeking the MA-8 Allottees' input regarding the management of MA-8 and at all times representing to third parties, including the State of Washington and Plaintiffs, that the **BIA** was the Lessor for all purposes under the Master Lease.

169. The **BIA** repeatedly acknowledged that the Master Lease and Plaintiffs' tenancy extended until 2034.

170. Plaintiffs relied on these statements, actions and omissions by investing in camping memberships, rents, improvements to the property, and in entering into the Settlement Agreement with Chief Evans, Inc.

171. The **BIA** now claims the Master Lease and Plaintiff's tenancy expires on February 2, 2009, contradicting its statements and actions for the past 20 years.

> 172. Permitting the **BIA** to repudiate its actions and statements of the last 20 years will cause actual and serious injury to Plaintiffs.

ECF No. 1 at ¶¶ 164-72 (emphasis added).

The fact that Mill Bay did not plead an estoppel claim against the allottees precludes entry of default judgment. Under Rule 54(c), a default judgment can only be entered on *claims that appear on the face of the complaint*. Fed. R. Civ. P. 54(c) ("A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings."). As explained in the Wright & Miller treatise, this is a matter of basic fairness to defendants, who may have made a calculated decision to take a default rather than defend the action:

> Rule 54(c) states that a judgment by default is limited to the relief demanded in the complaint. The theory of this provision is that the defending party should be able to decide on the basis of the relief requested in the original pleading whether to expend the time, effort, and money necessary to defend the action. *It would be fundamentally unfair to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should defendant attempt to limit the scope and size of the potential judgment by not appearing or otherwise defaulting, allow the court to give a different type of relief or a larger damage award.*

Wright & Miller, 10 Fed. Prac. & Proc. Civ. § 2663 (4th ed.) (emphasis added).

Rule 54(c) and basic fairness dictate that the motion be denied. On any fair reading of the Complaint, the estoppel claim is asserted only against the BIA. The defaulting allottees were entitled to rely on that fact—and presumably did—when they made the decision not to appear and defend. Mill Bay, for its part, could have pled the estoppel claim against the allottees rather than (or in addition to) the BIA. Had Mill Bay done so, the defaulting allottees may well have made a motion to dismiss at the outset. But, under Rule 54(c), the die was cast. Mill Bay is not

entitled to default judgment on a claim that does not appear in their Complaint and of which the defaulting allottees had no notice prior to taking defaults.

The United States acknowledges Judge Quackenbush, *after defaults were entered*, stated Mill Bay "asserted a claim for declaratory relief against the MA-8 landowners asserting that they are "equitably, collaterally, or otherwise estopped from denying the Plaintiffs their right to use the Mill Bay Resort until February 2, 2034." *See* ECF 197 at 2; ECF 227 at 3 (same). But declaratory relief is not a cause of action in itself, but rather a remedy that must be based on a valid underlying claim. *See, e.g., Lopez v. Wells Fargo Bank, N.A.*, 727 F. App'x 425, 426 (9th Cir. 2018) (affirming dismissal of request for declaratory relief where district court properly dismissed underlying claims); s*ee also Inciyan v. City of Carlsbad*, 2020 WL 94087, at *3 (S.D. Cal. Jan. 8, 2020) (listing cases).

As noted above, Mill Bay has not pled a valid underlying claim of estoppel against the allottees. The paragraphs of the Complaint that outline a claim for estoppel refers exclusively to "the BIA" as the defendant against whom the claim is being asserted. Judge Quackenbush's broader interpretation is apparently based on the fact that the Complaint's prayer for relief refers to "Defendants"—in the plural—as the parties against whom relief is requested. But one offhand reference to "Defendants" in the prayer for relief, which is not part of the claim itself for purposes of a Rule 54(c) analysis,[1] does not change the fact that the estoppel claim, as substantively pled, is unambiguously asserted only against BIA.

It also bears noting that Judge Quackenbush did not express his view that an estoppel claim had been pled against the allottees until May 2010. ECF No. 197 at 2. That was more than seven months *after* the defaults were entered in October

[1] Wright & Miller, 10 Fed. Prac. & Proc. Civ. § 2663 (4th ed.); *Am. Home Assur. Co. v. Phineas Corp.*, 347 F.Supp.2d 1231, 1239-40 (C.D. Fla. 2004).

2009. *See* ECF No. 135. Because the allottees did not have the benefit of Judge Quackenbush's expansive reading of the Complaint when they took their defaults, judgment cannot be entered on the more expansive reading as a matter of basic fairness. *See* Wright & Miller 10 Fed. Prac. & Proc. Civ. § 2662 (4th ed.) (after default has been entered, court "can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded"; restriction on considering new issues is a matter of "due process and of fair play").

At bottom, there is no estoppel *claim* asserted against the allottees on the face of the Complaint. For this reason alone, the Court must deny Mill Bay's motion for default judgment against the allottees under Rule 54(c).

2. Mill Bay is not entitled to default judgment because they have no cause of action for estoppel against the allottees as a matter of law.

Even if Mill Bay had properly pled a 'claim' for estoppel against the individual allottees, Mill Bay is not entitled to default judgment because their purported cause of action against the allottees for estoppel under Washington law is not a cognizable affirmative claim. *See Sloma v. Washington State Dep't of Ret. Sys.*, 459 P.3d 396, 406 (Wash. Ct. App. 2020) (equitable estoppel is not available for use as a "sword," or cause of action by plaintiffs); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P.3d 812, 818 (2005) ("Equitable estoppel is available only as a shield, or defense; it is not available as a sword, or cause of action").

Mill Bay seems to believe that because defaults have been entered, they are automatically entitled to entry of default judgments. Mill Bay is mistaken. Even after a default has been entered, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law." Wright & Miller, 10A Fed. Prac. & Proc. Civ.

§ 2688.1 (4th ed.); *see also Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992) ("[C]laims which are legally insufficient, are not established by default.") (emphasis added); *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007) (entry of default does not result in admission to legal conclusions); *Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1005 (C.D. Cal. 2014); (after entry of default, court "must still consider whether the unchallenged facts constitute a legitimate cause of action").

As a threshold matter, the Master Lease, from which Mill Bay once derived their right to use MA-8,[2] has expired and this matter is governed by *federal* law. *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011); 25 C.F.R. § 162.014(a)(1). Federal law allows the United States' in its trust capacity to take action to recover possession, including eviction. 25 C.F.R. § 162.023. It is the United States that is bringing the action for ejectment in its trust capacity, not the individual allottees in their personal capacity. Accordingly, any affirmative defense under federal law, can only be asserted against the United States, not the individual allottees under state law.

As previously explained,[3] Mill Bay's purpose in asserting an estoppel claim against the *allottees* is to avoid the well-settled rule that estoppel cannot be asserted against the federal government when the government is acting in a trust

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[2] Plaintiffs assert that they have a right to occupy MA-8 as licensees. Assuming *arguendo* that the contract under which Plaintiffs allegedly held that license is governed by Washington law, that fact is irrelevant because the allottees are not parties to that contract. Regardless, Court has ruled that the Master Lease precluded subletting for a term beyond the natural expiration of the lease. ECF No. 144 at pp. 30-31.

[3] ECF No. 232 at 14-16; ECF No. 306 at 7-8.

capacity for Indian landowners. *See, e.g.*, *United States v. City of Tacoma*, 332 F.3d 574, 581 (9th Cir. 2003) ("[T]here can be no argument that equitable estoppel bars the United States' action because, when the government acts as trustee for an Indian tribe, it is not at all subject to that defense."); *United States v. Ahtanum Irr. Dist.*, 236 F.3d 321, 334 (9th Cir. 1956) ("No defense of laches or estoppel is available to the defendants here[,] for the Government as trustee for the Indian Tribe, is not subject to those defenses."); *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017), *aff'd*, 138 S. Ct. 1832 (2018) ("The United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights."); *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) (noting "well-established" rule that a suit by the government as trustee on behalf of an Indian tribe is not subject to state delay-based defenses); *Cramer v. United States*, 261 U.S. 219, 234 (1923) (holding that government cannot be estopped from bringing suit to enforce rights of Indian landowners); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 360 (1941) (statements by Secretary of the Interior concerning title to parcels within Indian reservation did not estop federal government from maintaining ejectment action).

Mill Bay's bid to estop the allottees directly, while admittedly creative, fails because the United States is acting in its trust capacity. While the United States consulted with the individual Indian landowners and obtained majority approval of the allottees to initiate an ejectment action, there is no requirement that United States obtain majority *approval* of the allottees to take action *necessary* to protect allottees' trust assets; rather, the United States may delay an ejectment action only when a majority percentage of allottees take the affirmative step of *notify the BIA in writing* that the majority percentage is in good faith negotiations for a new lease. *See* 25 C.F.R. § 162.023 ("We may take action to recover possession, including

eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law."); 25 C.F.R. § 161.471 ("*Unless* the Indian landowners of the applicable percentage of interests under § 162.012 *have notified us in writing* that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action." (emphasis added). Even when the BIA Superintendent affirmatively reached out to the Indian allottees,[4] none of the Indian allottees, and certainly not a majority of the interest holders in MA-8 notified the BIA in writing they were in good faith lease negotiations. Indeed, only 2.3% of Indian allottees even indicated they had a *desire* to negotiate a new lease. ECF No. 234-21 at Attachment B, p. 61.

At bottom, individual allottees are not necessary parties to an ejectment action, and a majority of allottees have not notified the BIA in writing that good faith negotiations for a new lease are occurring that would forestall the United States' ejectment action. *See Heckman v. United States*, 224 U.S. 413, 445 (1912); 25 C.F.R. § 161.471; ECF No. 234-21, ¶¶ 5-7 & Ex. 3. Mill Bay has no cause of action for estoppel against the individual allottees under federal law (or state law), and it cannot challenge the trust status of MA-8 in response to an ejectment action. *French v. Starr*, 2015 WL 12592104, at *6-7 (D. Ariz. Feb. 12, 2015), *aff'd*, 691 Fed. Appx. 885 (9th Cir. 2017). Mill Bay has no cognizable claim against the individual allottees.

[4] Again, neither Wapato Heritage, LLC, nor Canadian nationals holding a small percentage in fee (approximately 4%) are Indian allottees.

3. The Court should defer ruling on the motion for default judgment until final judgment is entered.

Even assuming Mill Bay does have a viable estoppel claim against the allottees, it should defer ruling on Plaintiffs' motion for default judgment until final judgment is entered in this case.

When default is entered against fewer than all defendants in a multi-defendant case, the preferred practice is for the court to refrain from entering default judgment until the case is resolved on the merits against the defendants who are not in default. Wright & Miller, 10A Fed. Prac. & Proc. Civ. § 2690 (4th ed.) ("[W]hen one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted."); *see also Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1189 (9th Cir. 2009) ("[W]here there are several defendants, the transgressions of one defaulting party should not ordinarily lead to the entry of a final judgment, let alone a judgment fatal to the interests of other parties."); *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) ("It would likewise be incongruous and unfair to allow the Trustee to prevail against Defaulting Defendants on a legal theory rejected by the bankruptcy court with regard to the Answering Defendants in the same action."). This practice allows the case to proceed on the merits against the non-defaulting defendants, thereby avoiding the prospect of conflicting judgments in the event that the non-defaulting defendants prevail. *Garamendi v. Henin*, 683 F.3d 1069, 1083 (9th Cir. 2012); *see also United States v. Nichols*, No. 13-CV-0167-TOR, 2015 WL 13047134, at *4 (E.D. Wash. Mar. 10, 2015) (declining to enter default judgment that would "encompass[] some of the merits" of claims pending against non-defaulting defendants in order to avoid potentially conflicting judgments).

Entering default judgment against the defaulting allottees could lead to conflicting judgments. If the United States prevails on its claim to eject Mill Bay from MA-8, a judgment in their favor could not be reconciled with a judgment against the defaulting allottees proclaiming that Mill Bay are entitled to use the property through February 2034. The Court should defer ruling on the default judgment motion until the ejectment claim is decided and final judgment in this matter is entered. If the United States prevails, the motion can be denied as moot; if Mill Bay prevails, final judgment can be entered against the defaulting allottees consistent with the judgment against the Federal Defendants. Wright & Miller, 10A Fed. Prac. & Proc. Civ. § 2690; *Lemache v. Tunnel Taxi Mgmt., LLC*, 354 F. Supp. 3d 149, 152 (E.D.N.Y. 2019) (explaining that court presented with a motion for default judgment in this circumstance should "postpone decision . . . until the case against the litigating party concludes; if the litigating party loses, the default judgment can then be entered against the non-appearing party, and if the litigating party wins, the default judgment motion should be denied.").

Finally, the Court should be mindful that many of the allottees are *not* presently in default. To the extent Mill Bay has a viable 'claim' for estoppel against the allottees – it doesn't – the non-defaulting allottees are entitled to litigate the claim to judgment on the merits. As a matter of procedure and basic common sense, there is no reason to enter default judgment against a subset of the allottees when other allottees should prevail on the merits.

B. Mill Bay is not entitled to summary judgment against the allottees who did not answer Mill Bay's untimely requests for admission.

Mill Bay's motion for summary judgment fares no better than their motion for default judgment. Even if they did have a claim for estoppel against the allottees – again it does not – the requests for admission ("RFA") cannot support this purported claim. First, Mill Bay's RFAs are untimely and in violation of the

Court's prior order on discovery. Second, even if nine of the allottees are deemed to have admitted Mill Bay's untimely requests for admission, such purported admissions are of no legal consequence and cannot support summary judgment for Mill Bay. Finally, any purported admissions of nine allottees are not binding on the remaining allottees, or on the United States, and therefore do not preclude a ruling on the merits of the United States' ejectment claim.

1. Mill Bay's requests for admission are untimely and in violation of the Court's order.

The Court ordered that all requests for admission "must be served sufficiently early that all *responses are due before the discovery deadline*" of *November 1, 2012*. ECF No. 272 at p. 2 (emphasis added). Mill Bay allegedly *mailed* requests for admission to some allottees on October 1, 2012.[5] Under Fed. R. Civ. P. 6(d), allottees responses to these requests for admission would have been due *after* the discovery deadline, *i.e.* November 5, 2012.[6] Accordingly, pursuant to the Court's order, allottees were not required to give any response to such untimely requests. *See e.g., Baxter Bailey & Associates v. Ready Pac Foods, Inc.*, 2020 WL 1625257 at *1 (C.D. Cal., Feb. 26, 2020) ("Defendants were not obligated to respond to these untimely discovery requests, and their failure to do so does not create a dispute now."); *See also Dinkins v. Bunge Mill., Inc.*, 313 Fed. Appx. 882, 884 (7th Cir. 2009) (same).

More concerning, Mill Bay mailed their requests for admission *without serving* the United States, which is representing the collective trust interests of those allottees. See ECF No. 269-1 at p. 66 (Ex. 8) (not listing the United States on

[5] The Affidavit of Mailing is notarized on October 2, 2012. ECF No. 269-1 at p. 66 (Ex. 8).

[6] November 4, 2012 fell on a Sunday.

the certificate of service). The failure to serve the United States deprived it of an opportunity to object or conduct motion practice related to these RFAs with respect to the individual Indian allottees' trust interests.

In sum, procedural gamesmanship that violates a Court's prior order must not be condoned, but more importantly, should not allow Mill Bay to establish a (legally insufficient) 'claim,' particularly one purportedly based in *equity*.

2. Purported admissions of the non-answering allottees are of no legal consequence because Mill Bay does not have a claim for estoppel against the allottees as a matter of law.

Mill Bay's motion for summary judgment is predicated on its untimely RFAs being deemed admissions of nine allottees who did not answer. ECF No. 439 at 1-4, 6-11; ECF No. 440 at ¶ 12; ECF No. 296 at ¶¶ 9-12. Mill Bay contends these alleged admissions "conclusively establish" facts on which summary judgment must be granted in their favor on their estoppel claim against the allottees.

As explained above, Mill Bay has no cause of action for estoppel against the allottees as a matter of law. In bringing this 'claim' against the allottees, Mill Bay is attempting an end-run around well-settled precedent holding estoppel cannot be asserted against the federal government when it acts in a trust capacity on behalf of Indian landowners. *E.g.*, *City of Tacoma*, 332 F.3d at 581; *Ahtanum Irr. Dist.*, 236 F.3d at 334; *Washington*, 853 F.3d at 967; *Cato*, 70 F.3d at 1108; *Cramer*, 261 U.S. at 234; *Santa Fe Pac. R. Co.*, 314 U.S. at 360. As a matter of law, Plaintiffs cannot bring a 'claim' against the allottees that they are prohibited from bringing against the federal government acting in trust for the allottees. Accordingly, even assuming for the sake of argument that some allottees are deemed to have admitted the alleged facts in Mill Bay's requests for admission, the admission of those facts

is of no legal consequence. The motion for summary judgment must be denied on that basis alone.

3. The purported admissions of nine allottees are not binding on the other allottees or the Federal Defendants.

Even if Mill Bay had a cognizable 'claim' for estoppel against the allottees, and even if nine of the allottees are deemed to have admitted facts that may have some bearing on that claim, there is no basis for granting summary judgment. As a matter of hornbook law, deemed admissions are not binding on the *other* allottees, at least two of whom answered the requests for admission,[7] or on the Federal Defendants. *See Riberglass, Inc. v. Techni-Glass Indus., Inc.*, 811 F.2d 565, 566 (11th Cir. 1987) (deemed admissions of one defendant do not bind another defendant who timely answered the same requests for admission); *Becerra v. Asher*, 105 F.3d 1042, 1048 (5th Cir. 1997) ("Deemed admissions by a party opponent cannot be used against a co-party."); 10A Federal Procedure, Lawyers Edition § 26:704 (April 2020 update) (admission made pursuant to Rule 36 "is binding only upon the party to whom the request was directed and is not binding upon a coparty"); Wright & Miller, 8B Fed. Prac. & Proc. Civ. § 2264 (3d ed.) (admissions by one party under Rule 36 do not bind co-parties); *see also Lundquist v. United States*, 116 F.3d 1486 at *3 (9th Cir. 1997) (unpublished) ("We agree with the general rule that one party's admissions ordinarily may not be used against a co-party."). Accordingly, there is no basis for treating the facts deemed to have been admitted by the non-responding allottees as "conclusively

[7] Two of the allottees, Paul Wapato, Jr. and Sandra Covington, served timely answers to Plaintiffs' requests for admission. Declaration of Kristin M. Ferrera, ECF No. 296 at ¶¶ 9, 12. Plaintiffs have not provided those answers to the Court, presumably because Mr. Wapato Jr. and Ms. Covington denied the requests.

established" in Mill Bay's favor on summary judgment. Mill Bay's (now sixth) motion for summary judgment repackaging previously failed arguments must be denied.

III. CONCLUSION

In furthering its representation of the collective trust interests of the Indian allottees, respectfully, the Federal Defendants request the Court prohibit Mill Bay from concocting a fictitious record from the defaults and untimely requests for admissions in order to support a non-existent 'claim' against individual Indian allottes to attempt to defeat – at this late date – the meritorious motion for ejectment. Mill Bay and WHL knew MA-8 is trust land when they entered their business dealings, and thus should have been well aware of the special protections to which trust land is entitled. The mistakes of WHL or Mill Bay their settlement agreement, and the decision not to renew the Master Lease *with more than sufficient time to do so* must not be borne by the individual allottees. We respectfully request the Court deny Mill Bay's motions, grant the Federal Defendant's ejectment motion, and give the allottees back the unencumbered use of their trust land.

DATED this 8th day of May, 2020.

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s/ Joseph P. Derrig
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CERTIFICATE OF SERVICE

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