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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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October 31, 2019  
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**STB DOCKET NO. AB-1065X**

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**INDIANA SOUTHWESTERN RAILWAY CO.-ABANDONMENT EXEMPTION-IN  
POSEY AND VANDERBURGH COUNTIES, IN**

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**NOTICE OF SUPPLEMENTAL FILING**

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Dated: November 1, 2019

The Landowners wish to inform the Board that they have filed a renewed motion and memorandum to refer the issue of adverse abandonment to the Surface Transportation Board for determination pursuant to 28 U.S.C. § 1336(b) before the Court of Federal Claims—Chief Judge Margaret M. Sweeney. The Landowners’ motion is attached hereto as Exhibit A.

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### **CERTIFICATE OF SERVICE**

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by U.S. Mail, this 1<sup>st</sup> day of November, 2019.

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM R. BUTLER, et al.,

*Plaintiffs,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant.*

Case No.: 17-CV-00667

Honorable Chief Judge Margaret M. Sweeney

*Electronically filed November 1, 2019*

**PLAINTIFFS' RENEWED MOTION AND MEMORANDUM TO REFER THE ISSUE  
OF ADVERSE ABANDONMENT TO THE SURFACE TRANSPORTATION  
BOARD FOR DETERMINATION PURSUANT TO 28 U.S.C. § 1336(b)**

**TABLE OF CONTENTS**

|                                                                                                                                                                                                               |   |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| I. INTRODUCTION.....                                                                                                                                                                                          | 1 |
| II. THE APPLICABLE FACTS AND THE PROCEDURAL HISTORY ARE NOT<br>DISPUTED.....                                                                                                                                  | 1 |
| III. ISW’S POSITION CHANGES EVERYTHING BECAUSE IT IS NOT ONLY AN<br>AFFRONT TO THESE PLAINTIFFS BUT IT SHOULD BE AN AFFRONT TO THIS<br>COURT AS WELL .....                                                    | 4 |
| IV. THIS COURT SHOULD FORMALLY REFER THE QUESTION OF ADVERSE<br>ABANDONMENT TO THE STB FOR DETERMINATION PURSUANT TO 28 U.S.C. §<br>1336(b) TO REMOVE ANY DOUBT THAT THE STB MUST ADDRESS THE MERITS<br>..... | 8 |
| V. CONCLUSION .....                                                                                                                                                                                           | 9 |

# **TABLE OF AUTHORITIES**

|                                                                                                                                       |   |
|---------------------------------------------------------------------------------------------------------------------------------------|---|
| <i>Barclay v. United States</i> , 443 F.3d 1368 (Fed. Cir. 2006),<br>cert. denied, 549 U.S. 1209 (2007) .....                         | 7 |
| <i>Birt v. Surface Transp. Bd.</i> , 90 F.3d 580 (D.C. Cir. 1996) .....                                                               | 7 |
| <i>Caldwell v. United States</i> , 391 F.3d 1229 (Fed. Cir. 2004),<br>cert. denied, 547 U.S. 826 (2005) .....                         | 7 |
| <i>Chelsea Property Owners—Abandonment</i> ,<br>8 I.C.C.2d 773, 1992 WL 233599 (Oct. 16, 1992) .....                                  | 3 |
| <i>Consolidated Rail Corp. v. Interstate Commerce Comm’n</i> ,<br>29 F.3d 706 (D.C. Cir. 1994) .....                                  | 3 |
| <i>CSX Corp. &amp; CXT Transp., Inc.—Adverse Abandonment Application</i> ,<br>2002 WL 127074 (Feb. 1, 2002) .....                     | 3 |
| <i>Illig v. United States</i> , 274 Fed. Appx. 883 (Fed. Cir. 2008),<br>cert. denied, 129 S. Ct. 2860 (2009) .....                    | 7 |
| <i>Ladd v. United States</i> , 630 F.3d 1015 (Fed. Cir. 2010),<br>reh’g and reh’g en banc denied, 646 F.3d 910 (Fed. Cir. 2010) ..... | 7 |
| <i>Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri</i> ,<br>363 I.C.C. 969, 1981 WL 22670 (Aug. 19, 1981) .....        | 3 |
| <i>New York Cross Harbor R.R. v. Surface Transp. Bd.</i> ,<br>374 F.3d 1177 (D.C. Cir. 2004) .....                                    | 3 |
| <i>Preseault v. United States</i> , 100 F.3d 1525 (Fed. Cir. 1996) (“ <i>Preseault II</i> ”) .....                                    | 7 |
| <i>Thompson v. Texas Mexican Ry. Co.</i> , 328 U.S. 134 (1946) .....                                                                  | 3 |

## **I. INTRODUCTION**

Plaintiffs filed their original motion to refer the issue of adverse abandonment to the Surface Transportation Board (“STB”) pursuant to 28 U.S.C. § 1336(b) on August 7, 2019 (ECF No. 70). The government filed their brief in opposition on August 21, 2019 (ECF No. 72). The Court then entered its Order, which denied Plaintiffs’ motion without prejudice, on August 27, 2019 (ECF No. 74).

Plaintiffs then filed their Petition and Motion for Adverse Abandonment before the STB on September 6, 2019 (ECF No. 75, Exhibit A). Then, at the suggestion of the STB, in order to avoid a filing fee of \$27,000, Plaintiffs instead filed their Motion for Declaratory and Injunctive Relief and Request to Issue Show Cause Order stating why abandonment has not been consummated pursuant to 49 C.F.R. § 1152.29(e)(2) on September 11, 2019 (ECF No. 76, Exhibit A). The Indiana Southwestern Railway Co. (“ISW”) filed their Reply before the STB on October 15, 2019 (ECF No. 77, Exhibit A). Because ISW seeks to avoid the merits and maintains that Plaintiffs’ motion should be denied because it is procedurally and substantively incorrect, Plaintiffs now file their renewed motion to refer the issue of adverse abandonment to the STB.

## **II. THE APPLICABLE FACTS AND THE PROCEDURAL HISTORY ARE NOT DISPUTED**

Both the applicable facts and the procedural history are not really in dispute because the fact stipulations and the undisputed facts as developed at trial in *Memmer* are exactly the same in *Butler*.<sup>1</sup> The *Memmer* case went to trial in Evansville, Indiana from April 29, 2019 through May 2, 2019 and in Peoria, Illinois on May 7, 2019. The factual stipulations reached and the actual trial testimony in *Memmer* apply equally to *Butler*. In fact, Plaintiffs set forth the procedural history

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<sup>1</sup> Furthermore, ISW does not contest any of the operative facts either and, instead, merely attempts to rely on procedural points of law. See ECF No. 77, Exhibit A.

and the applicable facts in detail in their original motion to refer the issue of adverse abandonment to the STB.<sup>2</sup>

Although the applicable facts are not really in dispute at this point, the procedural history pertaining to Plaintiffs' motion to refer the issue of adverse abandonment to the STB needs to be updated as a result of ISW's response before the STB:

- 1) Plaintiffs' motion to refer the issue of adverse abandonment to the STB pursuant to 28 U.S.C. § 1336(b) was initially filed before this Court on August 7, 2019 (ECF No. 70)—Plaintiffs argued that 28 U.S.C. § 1336(b) governed such referrals to the STB, that the STB needed to rule on the issue of adverse abandonment because this Court ultimately had to decide the duration of the taking and the just compensation that is due and that, upon referral, the STB should conclude that the “public convenience and necessity require or permit the abandonment”;
- 2) The government's opposition to Plaintiffs' motion to refer the issue of adverse abandonment to the STB was filed on August 21, 2019 (ECF No. 72)—the government argued that ISW had not abandoned the railroad corridor at issue, Plaintiffs had not initiated an administrative “adverse abandonment” proceeding, and that Plaintiffs had attempted to invoke 28 U.S.C. § 1336(b) for an improper purpose;
- 3) The Court issued its Order on Plaintiffs' motion on August 27, 2019 (ECF No. 74)—the Court “fully [supported] plaintiffs'... pursuit of adverse abandonment proceedings before the Board” but denied Plaintiffs' motion without prejudice because Plaintiffs were going to initiate an adverse abandonment proceeding before the STB and because “the Court [concluded] that the proper approach for plaintiffs... is their initiation of adverse abandonment proceedings before the Board without the involvement of the court”;
- 4) Plaintiffs filed their Petition and Motion for Adverse Abandonment before the STB on September 6, 2019 (ECF No. 75, Exhibit A)—Plaintiffs argued that the procedural history and underlying facts were not in dispute, that the standard for adverse abandonment is whether the “public convenience and necessity require or permit the abandonment,” and that the underlying undisputed facts and the trial testimony from *Memmer* established that the corridor had been abandoned since there had been no train traffic since 2004,

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<sup>2</sup> See Pls.' Mot., ECF No. 70, at 2-4.

the rails and ties were removed in 2012, and that there was no “public convenience and necessity” for continuing train traffic;<sup>3</sup>

- 5) Because Plaintiffs’ original motion could not be accepted by the STB without a filing fee of \$27,000,<sup>4</sup> the STB suggested that Plaintiffs recast their motion to seek a declaratory order and a show cause order, at a cost of \$1,400, and Plaintiffs filed their Motion for Declaratory and Injunctive Relief and Request to Issue Show Cause Order stating why abandonment has not been consummated on September 11, 2019 (ECF No. 76, Exhibit A)—Plaintiffs again argued that the applicable procedural history and underlying facts are not really in dispute, that the STB has the authority to issue a declaratory order to force ISW to consummate abandonment pursuant to 49 U.S.C. § 1321(b)(4), and that the STB should issue such a declaratory order because the trial testimony from *Memmer* established that there had been no train traffic since 2004, the rails and ties were removed in 2012, and there was no “public convenience and necessity” pertaining to continuing train traffic; and
- 6) ISW filed their Reply on October 15, 2019 (ECF No. 77, Exhibit A)—ISW argued that Plaintiffs’ motion should be denied “because it is procedurally and substantively incorrect” given the STB’s regulations requiring the consummation of abandonment and that, “if the Landowners believe that the public convenience and necessity no longer requires the Line to be subject to the STB’s jurisdiction and that the STB’s jurisdiction should be lifted so that the Landowners may exercise whatever rights they have under state law, ICC and STB precedent is clear: the Landowners must obtain authority under 49 U.S.C. § 10903 to remove the STB’s jurisdiction,”<sup>5</sup> which means that ISW is attempting to require Plaintiffs to pursue an adverse abandonment petition at a cost of \$27,000 even though the STB suggested that the Plaintiffs file a motion for a declaratory order instead.

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<sup>3</sup> See *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 144 (1946); *Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri*, 363 I.C.C. 969, 1981 WL 22670 (Aug. 19, 1981); *Chelsea Property Owners—Abandonment*, 8 I.C.C.2d 773, 1992 WL 233599 (Oct. 16, 1992); *Consolidated Rail Corp. v. Interstate Commerce Comm’n.*, 29 F.3d 706, 708 (D.C. Cir. 1994); *CSX Corp. & CXT Transp., Inc.—Adverse Abandonment Application*, 2002 WL 127074 (Feb. 1, 2002); *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1180 (D.C. Cir. 2004).

<sup>4</sup> The filing fee of \$27,000 is an outrageous and prohibitive amount, particularly in this context, because the facts are not disputed, the standard for adverse abandonment is easily met based on the trial testimony during *Memmer*, this Court needs to address the issue in any event, and ISW should not be allowed to abuse the STB’s procedures and regulations in this fashion.

<sup>5</sup> See ISW’s Rep., ECF No. 77, Exhibit A, at 6.

**III. ISW'S POSITION CHANGES EVERYTHING BECAUSE IT IS NOT ONLY AN AFFRONT TO THESE PLAINTIFFS BUT IT SHOULD BE AN AFFRONT TO THIS COURT AS WELL**

ISW's Reply establishes why this Court should formally refer the issue of adverse abandonment to the STB. In an incredible effort to avoid any discussion of the merits whatsoever, ISW advances a completely circular argument that actually demonstrates why the blocking of Plaintiffs' reversionary rights is continuing. First, ISW presents an elaborate discussion of why the STB's suggestion to file a motion for a declaratory judgment was inappropriate and Plaintiffs' motion must be denied "because it is procedurally and substantively incorrect."<sup>6</sup> Second, ISW argues that the only recourse for the Plaintiffs is to actually file a Petition for Adverse Abandonment under 49 U.S.C. § 10903<sup>7</sup> at a cost of \$27,000.

ISW's circular argument is completed when they admit that they intended to abandon the corridor at the inception, received authorization from the STB to do so, and to this day still intend to railbank the line<sup>8</sup>—ISW has no intent whatsoever to ever run trains again, which is precisely the point and the basis of a finding of adverse abandonment, because ISW is using the Trails Act and the STB's requirement of consummation of abandonment as both a sword and a shield. ISW is flatly abusing the Trails Act and the STB's regulations and the ultimate losers are all of these adjacent landowners. Simply put, ISW should not be allowed to abuse the STB's regulations and the Trails Act in this manner.

ISW first goes to great lengths to argue that Plaintiffs' pending motion before the STB should be denied because it is procedurally and substantively incorrect. ISW states that Plaintiffs' motion "may have been appropriate"<sup>9</sup> before 1997 but, after 1997, the STB's regulations changed

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<sup>6</sup> *Id.* at 3-6.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 3.

to specifically require “a notice of consummation of abandonment.”<sup>10</sup> Obviously, ISW has no desire or intent to discuss or litigate the merits of an adverse abandonment petition, which begs the question of why the STB recommended that Plaintiffs file a motion for declaratory judgment in order to avoid an exorbitant filing fee and creates the obvious confusion over what the STB will in fact do now, but it is abundantly obvious that ISW is merely abusing the STB’s regulations to ultimately force some entity or people to pay them something for a purported asset that they effectively abandoned years ago. Instead of addressing the merits or the standard for adverse abandonment, ISW studiously relies on the consummation of abandonment requirement set forth in 49 C.F.R. § 1152.29(e)(2) to say that “the common carrier obligation is revived”<sup>11</sup> without such a consummation of abandonment.

ISW’s Reply is not only a total abuse of the STB’s regulations but it also totally ignores the obvious fact that this Court must confront the issues of the duration of the taking and the amount of just compensation that is due when state law abandonment has already occurred and the Plaintiffs’ reversionary rights are still being blocked. There is no public convenience and necessity for continued train traffic, a fact that ISW admitted in 2011 and the STB easily concluded and agreed, and ISW should not be allowed to abuse the STB’s abandonment regulations in this fashion to the detriment of these landowners and this Court’s judicial obligations.

After stating that Plaintiffs’ motion should be denied because it is procedurally and substantively incorrect and ISW’s common carrier obligation is still intact, without discussing or even mentioning the merits of adverse abandonment, ISW states that Plaintiffs must obtain authority under 49 U.S.C. § 10903 to remove the STB’s jurisdiction and “must file what is known

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<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

as an adverse abandonment application.”<sup>12</sup> So, it is obviously ISW’s position that the STB was incorrect to suggest that the Plaintiffs could file a motion for declaratory judgment, that Plaintiffs’ motion for declaratory judgment must be denied, and that Plaintiffs must file a petition for adverse abandonment at a cost of \$27,000. As a result, ISW attempts to rely solely on the STB’s regulation requiring the consummation of abandonment, while ignoring the Plaintiffs’ reversionary rights completely, and while ignoring the obvious fact that this Court must determine both the duration of the taking and the amount of just compensation due for that taking in this underlying litigation.

ISW is clearly and blatantly talking out of both sides of their mouth. ISW first says that they intend to vigorously oppose any attempt by the Plaintiffs to pursue an adverse abandonment proceeding.<sup>13</sup> In essence, ISW relies on their continuing common carrier obligation because they have not consummated abandonment under federal law even though they have removed the rails and ties, there has been no customer traffic since 2004, and they have no intent at any point in time in the future to reinstate rail traffic. Frankly, ISW admits that it was their intent to railbank the line when they first received abandonment authority and that it is still their intent to negotiate for a trail and to ultimately railbank the line.<sup>14</sup> So, not only does ISW want to avoid any discussion or finding of adverse abandonment, they want to rely on the STB’s continuing jurisdiction because of the STB’s requirement of consummation of abandonment in order to railbank the line sometime in the future which, ironically, establishes that the Plaintiffs’ reversionary rights are still being blocked simply and solely by the STB’s requirement of consummation of abandonment in the context of the Trails Act.

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<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 8.

It is in that context that ISW makes at least 2 incredible statements in their Reply. First, ISW states that they “never intended to consummate that abandonment authority and remove the corridor from the Board’s jurisdiction,”<sup>15</sup> which is directly contrary to the original Petition for Exemption they filed in 2011 and which is directly contrary to their own testimony during the *Memmer* trial. Second, ISW attempts to rely on *Birt v. Surface Transp. Bd.*, 90 F.3d 580 (D.C. Cir. 1996) for the proposition that ISW’s “continued intent to railbank shows an intention not to consummate abandonment.”<sup>16</sup> ISW’s attempted reliance on *Birt* is misplaced because there is no dispute that ISW has failed to consummate abandonment under federal law, which is not even relevant to whether a taking actually occurred under *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (“*Preseault II*”) and its progeny,<sup>17</sup> and *Birt* specifically stands for the proposition that “extensions *ad infinitum* may frustrate that purpose by allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use,”<sup>18</sup> which is precisely what has happened here.

Finally, ISW clearly misstates takings jurisprudence under the Trails Act and clearly misunderstands the Plaintiffs’ motivations. First, ISW states that “the entire basis for the Landowners’ takings claim filed for this Line is based on the premise that the Line remained at all times within the jurisdiction of the STB and as such the Landowners’ reversionary rights have been permanently taken”<sup>19</sup>—that is not the entire premise of Plaintiffs’ claims under the Trails Act because the taking is only permanent if a trail use agreement is signed and the taking is actually

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Caldwell v. United States*, 391 F.3d 1229, 1235 (Fed. Cir. 2004), *cert. denied*, 547 U.S. 826 (2005); *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007); *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 2860 (2009); and *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010), *reh’g and reh’g en banc denied*, 646 F.3d 910 (Fed. Cir. 2010).

<sup>18</sup> See *Birt*, 90 F.3d at 589.

<sup>19</sup> See ISW’s Rep., ECF No. 77, Exhibit A, at 9.

continuing in this case because ISW has intentionally and inappropriately failed to consummate abandonment. Second, in a footnote then, ISW exacerbates their misanalysis by stating that Plaintiffs “have reversed course” and that a finding of adverse abandonment “would moot the takings case”<sup>20</sup>—a finding of adverse abandonment would actually mean that the taking was temporary rather than permanent and would not moot the takings case at all. Instead, a finding of adverse abandonment would lead to the ultimate result desired by every Plaintiff in this case—**they want their land back.**

**IV. THIS COURT SHOULD FORMALLY REFER THE QUESTION OF ADVERSE ABANDONMENT TO THE STB FOR DETERMINATION PURSUANT TO 28 U.S.C. § 1336(b) TO REMOVE ANY DOUBT THAT THE STB MUST ADDRESS THE MERITS**

Given ISW’s Reply, it is now uncertain if the STB will address the merits of adverse abandonment or not. Although the STB suggested that the Landowners could file a motion for a declaratory order instead of a motion for adverse abandonment in order to avoid the exorbitant filing fee of \$27,000, ISW is attacking STB’s advice to the Landowners based on procedural and legal arguments so they can avoid any discussion of the merits. In order to eliminate ISW’s procedural argument, this Court should formally refer the question of adverse abandonment to the STB for determination pursuant to 28 U.S.C. § 1336(b).

Pursuant to the express terms of 28 U.S.C. § 1336(b), this Court will then have “exclusive jurisdiction” to “enforce, enjoin, set aside, annul, or suspend, in whole or in part, any Order” that the STB ultimately issues. The formal referral of the adverse abandonment issue to the STB means that the Landowners should avoid paying the exorbitant filing fee of \$27,000, the STB will not have to address ISW’s procedural arguments, and ISW will not be able to hide behind their purported continued common carrier obligation when they admit that the rails and ties have been

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<sup>20</sup> *Id.* at 9, fn. 11.

removed, there have been no customers since 2004, and there is no public convenience and necessity for continued train operations.

Although Plaintiffs maintain that adverse abandonment is easily established under these facts based on the standard of “public convenience and necessity,” the point is that the STB should reach a decision based on these facts, one way or the other. This Court also needs a determination, one way or the other, in order to ultimately fashion an appropriate remedy based on the ultimate duration of the taking and the ultimate necessary conclusion concerning just compensation. In essence, it is to everyone’s advantage to refer the adverse abandonment question directly to the STB at this point in time because it actually serves the interests of all parties and judicial economy. Although it is ultimately true that Plaintiffs might be able to pursue an adverse abandonment action by paying \$27,000, it would be an outrageous result and miscarriage of justice to require these Plaintiffs to pay \$27,000 when there are no disputed facts and this Court requires a decision on that issue in any event.

## **V. CONCLUSION**

ISW effectively abandoned this rail line many years ago because there had been no shippers to protect and there was no prospect of shippers in the future either. Although adverse abandonment should be easily established under these facts, ISW now says that the STB cannot and should not address the issue of adverse abandonment and it is uncertain whether the STB will address the issue or not. As a result, this Court should formally refer the question of adverse abandonment to the STB for determination pursuant to 28 U.S.C. § 1336(b) so there is no uncertainty as to whether the STB will entertain the issue and because a determination on that issue is critical to this Court’s ultimate responsibility to fashion an appropriate remedy for the continuing blockage of Plaintiffs’ reversionary rights.

Date: November 1, 2019

Respectfully submitted,

STEWART, WALD & McCULLEY L.L.C.

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing was filed with the Clerk of the Court via ECF on this 1<sup>st</sup> day of November, 2019 with a copy of the same being served via electronic mail (ECF) by the Clerk of the Court to:

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**ATTORNEYS FOR DEFENDANT**

/s/ Thomas S. Stewart  
**ATTORNEYS FOR PLAINTIFFS**