IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. AJKJ, INC.,	)	
Relator,	)	
v.	)	Case No. SC97461
THE HONORABLE CRAIG E. HELLMANN,	)	
Respondent.	)	

WRIT OF PROHIBITION

Circuit Court Case No. 18AB-SC97461

BRIEF OF RESPONDENT

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INTRODUCTION AND SUMMARY OF THE CASE

Relator AJKJ, Inc.'s ("AJKJ") Petition for Writ of Prohibition asks this Court to rubber stamp AJKJ's and Bequette Construction, Inc.'s ("Bequette") misuse of the judicial process to avoid and undermine an earlier judgment issued by the honorable Ada Brehe-Krueger of the Circuit Court of Franklin County in Cause No. 16AB-CC00083 (the "Bequette Lawsuit"). As set forth more fully below, following two years of litigation with Intervening Defendants in the underlying matter (the "Birch Creek Residents") and a one-day bench trial in the Bequette Lawsuit, Judge Brehe-Krueger entered a Judgment finding AJKJ did not transfer developer rights to New Sites LLC ("New Sites") in a deed dated August 25, 2014 (the "New Sites Deed").

Unhappy with Judge Brehe-Krueger's judgment, AJKJ filed the below Petition for Reformation seeking to reform the deed in an effort to avoid the effect of Judge Brehe-Krueger's judgment. Bequette's attorneys, who represent AJKJ in the instant action, asked the Court to add the words "developer rights" in the description of property, all in a clear and concerted effort to undermine the factual and legal findings made by Judge Brehe-Krueger so Bequette could use the reformed deed to set aside Judge Brehe-Krueger's judgment. In so doing, AJKJ failed to join the Birch Creek Residents as Defendants, despite the fact a reformed deed could potentially be used to prejudice the Birch Creek Residents' valuable property rights. To obtain quick judgment before the Birch Creek Residents could intervene, AJKJ persuaded the Honorable Craig E. Hellmann ("Respondent") to quickly schedule a trial by claiming the matter was

uncontested. Following the trial, which was held only six weeks after the Petition had been filed, Judge Hellmann granted reformation of the deed.

On July 10, 2018, the parties to the reformation lawsuit requested and obtained a trial setting of July 13, 2018. The Birch Creek Residents were unaware of the trial setting before trial. Soon after the Birch Creek Residents discovered the Reformation Judgment, they moved to intervene and set it aside. *(See generally*, Motion to Intervene). Once Judge Hellmann became aware of the circumstances surrounding the Bequette Lawsuit, he granted relief to the Birch Creek Residents and this action followed.

No circumstances justifying the issuance of a writ are present here because, as set forth below, Respondent correctly applied controlling Missouri Supreme Court precedent in granting intervention to the Birch Creek Defendants and setting aside the Judgment.

FACTUAL BACKGROUND[1]

I. The Subdivision and the Underlying Dispute

Relator filed the underlying case to avoid a Judgment issued by the Honorable Ada Brehe-Krueger of the Franklin County Circuit Court in the Bequette Lawsuit. Relator's counsel wants to use the Reformation Judgment to negate the ruling in the Bequette Lawsuit and filed this second lawsuit in order to prevent the Birch Creek Residents from protecting their interest in their subdivision.

At issue in the Bequette Lawsuit was whether Anthony Bequette's company, Bequette Construction Inc., held developer rights in the Birch Creek Subdivision (the "Subdivision"). (Respondent's Ex. 2, Bequette Judgment, A73-89). The Indentures governing the Subdivision, which were recorded in 2000, jointly identified AJKJ and New Sites as the developer of the Subdivision. (*Id*., A74-75). On August 25, 2014, AJKJ conveyed its interest in the lots jointly owned by AJKJ and New Sites to New Sites. (*Id*., A76). Importantly, however, it never conveyed its developer rights to New Sites. New Sites ultimately conveyed the lots to Legends Bank, which then conveyed its lots to Bequette on June 30, 2015. (*Id*., A77-78). On that same date, AJKJ attempted to convey its developer rights, which it had not transferred in 2014, to Bequette by way of a "Conveyance of Developer Rights." *Id*., A79).

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[1] Respondent does not believe the factual statement provided by Relator is accurate and complete, and it therefore provides the following factual background in accordance with MO. R. CIV. P. 84.04(f)

II. The Bequette Lawsuit and Judgment

To protect the value of their homes and the liveability and attractiveness of the Subdivision, both of which were threatened by Bequette's deviations from the original Covenants, the Birch Creek Residents filed the Bequette Lawsuit in April 2016. (*See generally*, Respondent's Ex. 8, Bequette Petition, A122-45). Among other things, the Birch Creek Residents objected to Bequette's efforts made under the cloak of "developer," including his preparation and filing of amendments to the Subdivision Indentures allowing, *inter alia,* smaller and cheaper homes than originally permitted by the Covenants. (*Id*.). The changes purportedly allow Bequette as developer to quickly and cheaply develop substandard homes to the detriment of the existing lot owners in the attractive, well-kept community.

The crux of the Bequette Lawsuit is whether Bequette holds developer rights with respect to the Subdivision. (*Id*.). Both equitable and legal claims were asserted in the Bequette Lawsuit; as a result, the court bifurcated the case for trial. (Respondent's Ex. 2, A73). On February 16, 2018, the court held a bench trial on the limited issue of whether Bequette held developer rights in the Subdivision, which the parties agreed was dispositive of the remaining issues in the lawsuit. (*Id*.).

On April 24, 2018, Judge Brehe-Krueger entered the Bequette Judgment finding AJKJ had never transferred its developer rights to New Sites. (*See id*., A88). As a result, New Sites did **not** transfer developer rights to Legends Bank, which in turn did not transfer developer rights to Bequette. **Consequently, Judge Brehe-Krueger concluded**

Bequette does not have developer rights and so held in the Bequette Judgment. (*Id*.).

In arriving at this conclusion, the court carefully considered the testimony of an AJKJ representative, Don Kappelmann, and made the following findings of fact:

> Plaintiffs have elicited testimony at trial and introduced deposition testimony by Donald Kappelmann, President of AJKJ **at the time of the execution of the New Sites Deed, that he did not intend to convey developer rights, did not believe he had developer rights to convey since he was not performing a developer function**…. In addition to not including developer rights in any writing, Mr. Kappelmann did not even discuss developer rights with representatives of New Sites or Legends Bank in the negotiations leading to or in conjunction with the Agreement and thus could not have expressed his intent to transfer developer rights at that time. **Donald Kappelmann testified that he did not intend to transfer developer rights in the New Sites Deed**. In fact, he did not even believe AJKJ had developer rights to convey. Defendants have presented **no evidence of an intention to transfer developer rights at the time of the conveyance of the undeveloped lots from AJKJ to New Sites**.

(*Id*., A84-85, ¶¶ 46, 48) (emphasis added).

III. Bequette's Lawyers File the Below Lawsuit to Avoid the Bequette Judgment

Obviously displeased with the Bequette Judgment, rather than appeal same, AJKJ instead filed its Petition in the underlying matter on June 1, 2018. Interestingly, AJKJ was represented by the **exact same** lawyers who represent Defendants in the Bequette Lawsuit. (*See generally*, Reformation Petition, A56-A69). AJKJ named only New Sites LLC, Legends Bank and Bequette Construction Inc. as defendants. (*Id*.). AJKJ did not name any of the lot owners in the Subdivision who would be affected by the reformation. (*Id*.).

In its Petition below, AJKJ alleged that, by a mutual mistake, the New Sites Deed "inadvertently failed to include the words 'developer rights,' which has caused confusion and problems for subsequent title holders to the Birch Creek Subdivision lots." (*Id*., ¶¶ 13, 14). Based on this alleged mutual mistake, AJKJ requested the Court to reform the New Sites Deed to add the words "developer rights" in the description of property.

AJKJ sought this relief below notwithstanding AJKJ's testimony (through its representative Don Kappelmann) just months earlier that it did not intend to convey developer rights and in fact did not believe it had developer rights to convey. (*See* Respondent's Ex. 2, Bequette Judgment, A84-85, ¶¶ 46, 48). In other words, AJKJ sought relief in the underlying cause which was directly contrary to its own testimony in the Bequette Lawsuit – all in an effort to undo the Bequette Judgment.

In a rush to a judgment, on July 10, 2018, counsel for Bequette and AJKJ requested Judge Hellmann to set a quick trial date. (Respondent's Ex. 1, Affidavit of C. Hellmann, A70-72, ¶ 2). Based on what was represented to be a simple, uncontested case

that had the blessing of Judge Brehe-Krueger, Judge Hellmann scheduled the bench trial for July 13, 2018 – only three days later. (*Id.*, ¶ 2). At a subsequent meeting in chambers, counsel advised Judge Hellmann that Judge Brehe-Krueger had indicated it was proper to get a reformation of the New Sites Deed.[2] (*Id.*, ¶ 3). Judge Hellmann relied on the representations (and omissions) made by counsel and trusted that if he needed to look at any additional information, counsel for the parties requesting reformation would have provided it to him. (*Id.*, ¶ 4). Counsel did **not** advise him that a specific finding had already been made as to Kappelmann's testimony. (*Id.*, ¶ 5). Counsel for the parties requesting relief also failed to provide Judge Hellmann a copy of the Bequette Judgment, so he had no idea of the nature of the contents of the Bequette Judgment. (*Id.*, ¶ 6). After the bench trial, on July 19, 2018, Judge Hellmann signed and entered the proposed judgment provided by AJKJ's counsel, which became the Reformation Judgment. (*Id.*, ¶ 7).

Meanwhile, Bequette filed a motion for new trial in the Bequette Lawsuit, which was denied on August 8, 2018. Thereafter, on August 14, 2018, the Birch Creek Residents filed their Motion to Intervene and Set Aside in the below action. After Judge

[2] These communications between counsel and Judge Hellmann were not on the record, but were relayed to counsel for the Birch Creek Residents by Judge Hellmann. As set forth below, in ruling on the Motion to Intervene and Set Aside, Judge Hellmann properly considered oral representations and omissions made directly to him by counsel in the Reformation Lawsuit.

Hellmann received the Motion to Intervene and Set Aside, he reviewed the docket for the Bequette Lawsuit on Case.net.[3] (*Id*., ¶ 8). Upon reviewing the Bequette Judgment entered by Judge Brehe-Krueger, he learned for the first time she **had** made a specific finding as to Kappelmann's testimony. (*Id*., ¶ 9). He then reviewed Kappelmann's testimony, which was part of the file and available on Case.net. (*Id*., ¶ 10). (*See* Transcript, A185, *et. seq*.). Had Judge Hellmann known about Kappelmann's testimony and the finding in the judgment, he would either have not allowed the trial to go forward or would have demanded cross-examination of Kappelmann on this issue. (Respondent's Ex. 1, ¶ 11). In response to AJKJ's representations to this Court set forth in their Petition, Judge Hellmann denies he was made "fully aware" of the facts and circumstances of the Bequette Lawsuit. (*Id*., ¶ 12).

Based on his review of the file in the Bequette Lawsuit, including the Findings of Fact and Conclusions of Law and the Kappelmann deposition transcript, Judge Hellmann granted the Birch Creek Residents' Motion to Intervene and Set Aside on September 13, 2018. (*Id*., ¶ 13). This action followed.

[3] The Trial Court properly considered the file in the Bequette Lawsuit in granting the Motion to Intervene and Set Aside. *See State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474 (Mo. App. 1998) (trial court may on its own motion take judicial notice of the court's records in other prior proceedings, and the trial court's judicial notice of the file may provide adequate evidentiary basis to support factual or legal finding).

ARGUMENT

I. The Trial Court Had Jurisdiction to Rule Upon the Motion to Intervene (Responding to First Point Relied On).

The sole basis for AJKJ's writ is its claim the Trial Court exceeded its jurisdictional authority in ruling on the Motion to Intervene and Set Aside. Accordingly, the only issue before this Court is whether the Trial Court had jurisdiction.

In asking the Trial Court to allow them to intervene and to set aside the judgment, the Birch Creek Residents invoked Rule 74.06(b), which provides as follows:

> **Excusable Neglect – Fraud – Irregular, Void, or Satisfied Judgment.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

A Rule 74.06(b) motion is not subject to any specific time limit but must be made "within a reasonable time." MO. R. CIV. P. 74.06(c).

A writ of prohibition is inappropriate here because the Trial Court acted within its jurisdiction in granting the Motion to Intervene and Set Aside. In *Nervig v. Workman*, 285 S.W.3d 335 (Mo. App. 2009), the trial court granted a default judgment against an uninsured motorist and, several months later, the plaintiff's uninsured motorist carrier moved to intervene and set aside the default judgment. *Id*. at 339. The trial court granted the motion to intervene. The insurer then appealed, and the plaintiff moved to dismiss the appeal, arguing the trial court was without jurisdiction to rule on the motion to intervene, as it was filed more than 30 days after entry of judgment. The Court of Appeals declined to dismiss the appeal, holding the insurer's motion to intervene was timely because it was filed while the trial court still had authority to set aside the judgment under Rule 74.05. *Id*. at 341. The *Nervig* Court explained that a motion to set aside under Rule 74.05 operates as an "independent action" and a ruling thereon "is treated as an independent judgment." *Id*. at 340. Thus, courts applying Rules 52.12 and 74.05 should not require the would-be intervenor to obtain a ruling on its motion within 30 days of the judgment. *Id* at 341.

The same conclusion was reached in *Kranz v. Centropolis Crusher, Inc*., 630 S.W.2d 136, 140 (Mo. App. 1982). In that case, a party moved to intervene and to set aside a default judgment more than six months after that judgment was entered. *Id*. at 138. The trial court refused intervention, holding it was without jurisdiction. The Court of Appeals reversed, concluding that a motion to set aside a default judgment was not subject to the general rule regarding the loss of jurisdiction after thirty days, because the

intervenor's motion operated as a separate proceeding in equity that the trial court could entertain despite the passage of more than thirty days. *Id*. at 139-40.

While *Nervig* and *Kranz* both addressed Rule 74.05, their holdings apply with equal force here. The driving force behind the holdings in *Nervig* and *Kranz* is the fact motions brought under Rule 74.05 are treated as independent suits in equity. The same is true for motions brought under Rule 74.06:

> This Rule 74.06 does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment **shall be by motion as prescribed in these Rules or by an independent action**.

MO. R. CIV. P. 74.06(d). *See also In re Marriage of Hendrix*, 183 S.W.3d 582, 587 (Mo. banc 2006) (A circuit court's ruling on a Rule 74.06(b) motion is in the nature of an independent proceeding); *Bi-State Dev. Agency of Mo.-Ill. Metro. Dist. v. Ames Realty Co*., 258 S.W.3d 99, 106 (Mo. App. 2008) (a Rule 74.06(b) motion filed after a judgment becomes final is an independent action requiring the trial court to enter a separate judgment).

Importantly, a Rule 74.06(b) motion filed after a judgment becomes final **must be treated as a separate independent action even when it is filed in the same case in which the judgment was rendered**. *McCullough v. Commerce Bank, N.A*., 368 S.W.3d

296, 300 (Mo. App. 2012). To that end, it is an abuse of discretion for a trial court to treat a Rule 74.06 motion as an authorized post-trial motion. *Id*. (because motion under Rule 74.06 was not an authorized post-trial motion, the trial court did not lose jurisdiction to rule on it 90 days after the judgment pursuant to Rule 81.05(a)(2)).

When the Birch Creek Residents filed their Motion to Intervene and Set Aside, it was properly considered an independent action, and not a continuation of the Reformation Lawsuit. Accordingly, under *Nervig* and *Kranz*, the Motion to Intervene and Set Aside was not untimely, and the Trial Court had jurisdiction to consider and rule upon it.

II. The Reformation Judgment Was Properly Set Aside Under Rule 74.06 (Responding to Second Point Relied On).

Rule 74.06(b) permits a judgment to be set aside where, among other things, (1) it is rendered as a result of fraud, misrepresentation, or other misconduct of an adverse party, (2) it is void and/or (3) it is no longer equitable that the judgment remain in force. As set forth below, all three of these circumstances are present here.

A. The Reformation Judgment was Rendered As A Result of Misrepresentation, Intentional Omission or Other Misconduct by AJKJ.

The Reformation Judgment was properly set aside because it was rendered without providing all relevant information regarding the Bequette Judgment – information which was vital to a full and fair determination of the issues before Judge Hellmann. These misrepresentations and omissions by AJKJ's (and Bequette's) counsel support the strong

inference that they were made to quickly rush the Trial Court to a judgment in the below lawsuit to the detriment and prejudice of the Birch Creek Residents.

Furthermore, the tactics employed in the filing and trial of this suit can be seen as nothing more than AJKJ/Bequette's lawyer's efforts to undercut the Bequette Judgment. Such back-door methods should not stand. The Trial Court properly set aside its Reformation Judgment and ordered a new trial – one in which the Trial Court can be duly advised of all relevant facts underlying the claimed "mutual mistake" alleged in this matter.

B. The Reformation Judgment is Void Because It Was Entered Without Participation of the Birch Creek Residents, Who Are Necessary and Indispensable Parties in the Reformation Action.

Setting aside the Reformation Judgment was further proper under Rule 74.06 because it was rendered without participation of Birch Creek Residents, who were necessary and indispensable parties. This Court has expressly held that a judgment rendered without representation of necessary and indispensable parties is void. *Pauli v. Spicer*, 445 S.W.3d 667, 673 (Mo. App. 2014). "This is because the presence of an indispensable party is a jurisdictional requirement and **the failure to join that party deprives the trial court of jurisdiction and renders the judgment a nullity**." *Id.* (citations omitted, emphasis added). When ongoing litigation does not join a necessary and indispensable party, the trial court lacks personal jurisdiction over that party "and the constitutional principle of due process bars it from affecting the rights and interests of [that] particular person." *Id.* (internal quotations omitted).

Whether the Birch Creek Residents are "necessary and indispensable" parties in the Reformation Lawsuit requires a two-part inquiry: (1) whether they are necessary parties and if so, (2) whether they are indispensable. *Id*. at 674. As to the first prong, whether the Birch Creek Residents are necessary parties, Rule 52.04(a) governs. This rule provides, in relevant part:

> A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) **the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may**: (i) as a practical matter **impair or impede the person's ability to protect that interest**, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(emphasis added). An "interest" compelling joinder under Rule 52.04(a) "must be a direct claim upon the subject of the action such that the joined party will either gain or lose by direct operation of the judgment rendered." *Id*.

If any party is found to be a necessary party under Rule 52.04(a) and it is feasible to join it, then, per Rule 52.04, that party must be joined. Whether or not a party is "indispensable" is then determined by applying the criteria of 52.04(b): (i) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties; (ii) the extent to which by protective provisions in the judgment, by the

shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *Id*. at 674-75.

Applying this law, the Birch Creek Residents were both necessary and indispensable parties below. Reformation of the New Sites Deed in the manner requested by AJKJ directly impacts whether Bequette is the developer under the Subdivision Covenants. Whether or not Bequette is the developer will have drastic repercussions on the Subdivision and the Birch Creek Residents. If Bequette is developer, it will use this status as a basis for developing homes whose size and design is wholly inconsistent with the existing homes in the Subdivision and the metrics set forth in the Covenants, thereby decreasing the property values of the existing homes in the Subdivision and eradicating the intent of the Covenants. If Bequette is not developer, the Birch Creek Residents can enforce the Covenants against Bequette and halt its countless breaches of the Covenants, thereby maintaining the integrity and the design standards of their community.

This is especially true insofar as several of the Birch Creek Residents are bona fide purchasers who purchased lots in reliance upon recorded instruments, including the New Sites Deed. Specifically, eighteen lots in the Subdivision have sold since the New Sites Deed was executed on August 25, 2014. Most of these bona fide purchasers – including, without limitation, the Burnetts, the Micichs, the Ridolfis, Ruff and Day, the Mantias, the Websters, the Arnolds and the Johnsons – purchased when there was no longer a developer in the Subdivision because the New Sites Deed made clear that developer

rights had never been transferred in connection with the AJKJ-New Sites conveyance. Where, as here, homeowners purchase a home subject to restrictive covenants, they are bound by those covenants and entitled to rely on those covenants in place at the time of their purchases. *See Maryland Estates Homeowners' Ass'n v. Puckett*, 936 S.W.2d 218, 219 (Mo. App. 1996). Because the New Sites Deed cannot be reformed due to this prejudice to the bona fide purchasers, it cannot be reformed at all. *See also Hazelbaker v. County of St. Charles*, 235 S.W.3d 598, 603 (Mo. App. 2007) (a change to a restrictive covenant is valid as to all of the restricted lots or to none of the restricted lots). Moreover, the Birch Creek Residents have proceeded with forming a homeowner's association and holding elections with respect thereto, as is their right under the Covenants.

Accordingly, the Birch Creek Residents have an obvious interest relating to the property or transaction that is the subject of the action. The clear intent behind Bequette's counsel filing the below action is to use the reformed New Sites Deed as a sword in the Bequette Lawsuit to undermine Judge Brehe-Krueger's Judgment. Bequette intended to use the reformed deed to support its claim it is developer (notwithstanding Judge Brehe-Krueger's previous findings to the contrary). Indeed, Bequette moved to dismiss or vacate the Bequette Judgment in the Bequette Lawsuit shortly after Judge Hellmann issued the Reformation Judgment and continues to seek to delay the Bequette Lawsuit based solely on its pending Petition before this Court.

For these reasons, the Birch Creek Residents were both necessary and indispensable parties below. Because they were not joined in the suit by AJKJ, the

Reformation Judgment is void. Judge Hellmann therefore properly set aside the Reformation Judgment.

C. It is Inequitable for the Reformation Judgment To Remain in Force.

It would be unjust and inequitable for the Reformation Judgment to remain in force for all of the reasons detailed above – including, without limitation, (1) AJKJ's failure to join the Birch Creek Residents as parties to the Reformation Lawsuit, thereby depriving them of their ability to fully enforce their rights, (2) the method by which the Reformation Lawsuit was rushed to judgment and (3) the fact Judge Hellmann was not made aware of important facts, evidence and testimony relating to the Bequette Lawsuit and Bequette Judgment and the possible repercussions a reformed deed may have on that litigation and on the Birch Creek Residents. As a result, the Trial Court properly set aside the Reformation Judgment and this Court should deny AJKJ's requested relief.

CONCLUSION

WHEREFORE, the Birch Creek Residents, on behalf of the Honorable Craig E. Hellmann, respectfully pray this Court to deny Relator AJKJ, Inc.'s request for a Preliminary and Permanent Writ of Prohibition and grant such other and further relief as the Court deems just and proper under the circumstances.

Dated: February 25, 2019

LATHROP GAGE LLP

By: */s/ Michael A. Clithero*

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06 that this Brief includes the information required by Supreme Court Rule 55.03, complies with the limitations contained in Supreme Court Rule 84.06 and that it contains 4,419 words, excluding the cover, this certificate, the certificate of service and the signature block, as determined by the Microsoft Office word-counting system.

/s/ Michael A. Clithero

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing was served via the Court's electronic filing system, on this 25th day of February, 2018.

/s/ Michael A. Clithero