Nos. 18-3307, 19-2401 & 19-2408

In The United States Court of Appeals for the Seventh Circuit

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SHAUN A. HOUSE, Individually and on behalf of
all others similarly situated,
Plaintiff-Appellee,

v.

AKORN, INC., et. al.,
Defendants-Appellees.

APPEAL OF: THEODORE H. FRANK,
Intervenor.

DEMETRIOS PULLOS,
Plaintiff-Appellant,

v.

AKORN, INC., et. al.,
Defendants-Appellees.

SHAUN A. HOUSE, Individually and on behalf of
all others similarly situated,
Plaintiff-Appellant,

v.

AKORN, INC., et. al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois,
Nos. 17-cv-05018 & 17-cv-05026, The Honorable Thomas M. Durkin, District Judge

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES IN NOS. 19-2401 & 19-2408

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3307; 19-2401; 19-2408

Short Caption: House v. Akorn, Inc. et al.; Pullos v. Akorn, Inc. et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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N/A

Attorney's Signature: s/ Daniel E. Jones Date: 12/2/2019

Attorney's Printed Name: Daniel E. Jones

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Attorney's Signature: s/ Steven P. Lehotsky Date: 12/2/2019

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N/A

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Attorney's Printed Name: Janet Galeria

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** X

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the federal securities laws.

Unjustified private securities litigation imposes a significant burden on the Chamber's members and adversely affects their access to capital markets. The Chamber therefore has a strong interest in providing its perspective on the wave of lawsuits that have hit federal courts in recent years alleging misstatements in connection with a public company's merger or acquisition. As the district court correctly observed, these lawsuits to a significant degree amount to a "racket" (A39), characterized by unjustified, abusive claims and illegitimate settlements that provide substantial payments to plaintiffs' lawyers but no corresponding benefits to investors.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The securities class action system is plagued with serious problems, many of which are exemplified by claims and settlements like those in this case. The Chamber does not seek to address whether, under the specific circumstances presented here, the district court had the authority to order the return of attorneys' fees. Rather, the Chamber files this brief to explain the broader context in which this case arose—that context demonstrates why the district court was absolutely right when it characterized these settlements as a "'racket'" and concluded that the underlying lawsuits "should have been 'dismissed out of hand.'" A39 (quoting *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016)). That broader context underscores why district courts in this Circuit need this Court's guidance about how to police against and remedy this type of abusive litigation.

In recent years, the number of securities lawsuits has exploded, reaching levels not seen since before the enactment of the Private Securities Litigation Reform Act in 1995.

One significant driver of this jump in litigation is the filing of lawsuits in federal court—like the ones here—alleging misstatements in connection with a public company's merger or acquisition. In the past three years, federal courts have been hit with an avalanche of such M&A cases after the Delaware Court of Chancery and other state courts cracked down on settlements that provided no benefits to investors but "six-figure fees to plaintiffs' counsel"—because the availability of such settlements caused "deal litigation to explode in the United States beyond the realm of reason." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 894 (Del. Ct. Ch. 2016);

accord In re Walgreen, 832 F.3d at 725. The result of decisions like *Trulia* is that M&A cases continue to brought, but have simply migrated to federal court.

Plaintiffs' lawyers in M&A cases have developed a playbook that exhibits every characteristic of classic litigation abuse. When a merger or acquisition is announced and disclosure information is provided to the participants' shareholders, plaintiffs' law firms rush to file suit, claiming that the disclosures are inadequate or misleading (or both). Much more important, they often seek a preliminary injunction to put the transaction on hold until the lawsuit is resolved. There is heavy pressure on the defendants to settle even meritless claims quickly, because they want to be able to close the deal and realize the economic benefits of the merger or acquisition. Leveraging that desire for a speedy resolution, plaintiffs seek to avoid any federal court oversight by using the tactic of an out-of-court settlement—in which the defendant agrees to insignificant additional disclosures, the plaintiffs' lawyers are paid a "mootness fee," and the case is dismissed.

Courts should either intervene to stop that practice of extorting blackmail settlements, as the district court did here, or at minimum use active case management techniques to attack the problems they pose and deter the filing of meritless suits. In particular, district courts should:

- hear motions to dismiss M&A cases on a highly accelerated schedule;
- rigorously apply the requirements of Federal Rule of Civil Procedure 11(b) to sanction frivolous filings;

- scrutinize in particular lawsuits by repeat plaintiffs and their counsel; and
- be prepared to "dismiss[] out of hand" (*In re Walgreen*, 832 F.3d at 724) abusive M&A cases at the earliest possible time in the case.

If this Court were to endorse some or all of these steps, that guidance would have the salutary effect of reducing—and perhaps even eliminating—abusive and unwarranted M&A cases in this Circuit.

ARGUMENT

I. Abusive M&A Class Actions Harm Shareholders And The Federal Court System, And Benefit Only Lawyers.

A. M&A Cases Are Being Filed At Alarming Rate.

Congress enacted securities litigation reforms in 1995 because it found that "certain lawyers file frivolous 'strike' suits alleging violations of the Federal securities laws in the hope that defendants will quickly settle to avoid the expense of litigation." S. Rep. No. 104-98, at 4, 9 (1995). Over two decades later, the same harms are back, with securities class action filings reaching levels not seen since enactment of the PSLRA in 1995.

In 2017, studies reported either 415 or 412 federal class action securities suits filed—more than *50% higher* than 2016's total number of filings and more than double the average annual case filings over the past twenty years (193 cases). *See* Cornerstone Research, *Securities Class Action Filings Reach Record High for Second Straight Year* (Jan. 30, 2018), https://www.cornerstone.com/Publications/Press-Releases/Securities-Class-Action-Filings-Reach-Record-High; Kevin LaCroix,

Securities Suit Filings at Historically High Levels During 2017 (Jan. 1, 2018), https://www.dandodiary.com/2018/01/articles/securities-litigation/securities-suit-filings-historically-high-levels-2017. Moreover, these suits were filed against 8.4% of all U.S.-listed companies—which means one out of every twelve public companies was sued in a securities class action in 2017. Cornerstone Research, *Securities Class Action Filings – 2017 Year in Review* 5, 10 (2018), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-YIR.

Filings in 2018 demonstrated that this level of litigation activity is the new normal, with one analyst reporting 403 federal filings (and a combined federal and state total exceeding 2017 levels). Cornerstone Research, *Securities Class Action Filings: 2018 Year in Review* 5, 19 (2019), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review (drawing from Stanford Law School Securities Class Action Clearinghouse data). That means, as one experienced observer put it, that "2018 arguably represents the most significant year of securities litigation filing activity since the end of the dot-com era." Kevin LaCroix, *Cornerstone Research: Combined Federal and State Securities Suit Filings at Highest-Ever Levels in 2018* (Jan. 30, 2019), https://www.dandodiary.com/2019/01/articles/securities-litigation/cornerstone-research-combined-federal-state-securities-suit-filings-highest-ever-levels-2018/.

Data for the first half of 2019 indicates that filings remain at the same high level, with 198 federal securities class actions filed. Cornerstone Research, *Securities Class Action Filings: 2019 Midyear Assessment* (2019), http://securities.stanford.edu/

research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-MYA.pdf.

M&A litigation is a significant driver of this increased litigation activity. M&A lawsuits comprised approximately half of the federal securities class action filings in 2018. John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions* (Jan. 22, 2019), http://clsbluesky.law.columbia.edu/2019/01/22/the-changing-character-of-securities-litigation-in-2019-why-its-time-to-draw-some-distinctions/. In 2018, shareholders challenged 142 M&A deals (often with multiple lawsuits filed for each deal). Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2018 M&A Litigation* 1 (2019), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2018-M-and-A-Litigation-pdf. Moreover, as a recent academic study has reported, an overwhelming majority of mergers or acquisitions with a value of $100 million or more involving a public company are met with an M&A lawsuit. Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603, 620, 621 (2018); *see also* U.S. Chamber Institute for Legal Reform, *A Rising Threat* 7 (Oct. 2018), https://www.instituteforlegalreform.com/uploads/sites/1/A_Rising_Threat_Research_Paper-web_1.pdf ("Rising Threat"); U.S. Chamber Institute for Legal Reform, *Containing the Contagion* 6-7 (Feb. 2019), https://www.

instituteforlegalreform.com/uploads/sites/1/ContainingtheContagion_Paper_WEB_FINAL.pdf.[2]

The plaintiffs' bar responded to state-court crackdowns on M&A settlements—most significantly in the *Trulia* litigation—by shifting M&A lawsuits to federal court. In 2009, for example, only 15% of M&A deals over $100 million triggered federal court lawsuits. But in 2017, 74% of M&A deals over $100 million attracted federal securities suits—a *500% increase* from 2009. Cain, *supra*, 71 Vand. L. Rev. at 621. And in 2018, 91% of challenged M&A deals were litigated in federal court. Cornerstone Research, *Review of 2018 M&A Litigation*, *supra*, at 4.

In sum, the data confirm that the federal courts are being inundated with an unprecedented level of M&A class actions, like the cases here.

B. M&A Cases Are Virtually Always Resolved Without Any Benefit To Shareholders.

By design, M&A cases are brought and wrapped up quickly. A suit is usually filed "within days of the public announcement of the merger." Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557, 565 (2015). "Because claims that are not resolved on motions or settled prior to closing can theoretically be litigated long after closing, creating a potentially significant contingent liability, defendants have a strong incentive to resolve merger claims before the merger closes." *Id.* at 565-66.

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[2] One of the undersigned counsel for the Chamber in this case prepared the two papers released by the Chamber's Institute for Legal Reform that are cited in this paragraph.

One law school professor, Jennifer Johnson, put it succinctly: "If [the companies] want their deal to go through, they don't have time to win." Ann Woolner, Phil Milford & Rodney Yap, *Merger Suits Often Mean Cash for Lawyers, Zero for Investors*, Bloomberg News (Feb. 16, 2012), http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html. And the quick timeline and pressure on defendants to settle incentivizes plaintiffs' lawyers to file lawsuits without regard to a claim's underlying merit. As another academic, Charles M. Elson, has explained, "'[t]he quicker the suit, the less thoughtful the suit. You're striking on the mere announcement of the merger,' with little information about its fairness." *Id.*

Data about the resolution of M&A lawsuits bear out these observations. The "vast majority end in settlement or dismissal," and "[i]n most settled cases, the only relief provided to shareholders consists of supplemental disclosures in the merger proxy statement"—accompanied by a fee award to the plaintiffs' lawyers. Fisch, *supra*, 93 Tex. L. Rev. at 559. For example, a study of M&A cases from 2003-2011 found that the overwhelming majority of cases were settled (72%) and 77% of settlements provided for disclosure only. Yet the average attorneys' fee for these cases was $749,000. Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 477, 478 (2015) Only five percent of cases resulted in an increase in consideration for shareholders. *Id.* at 479. And the 28% of cases that were not settled were ultimately dismissed. *Id.* at 478.

A recently-issued study of securities class actions documents the deadweight loss to shareholders from these M&A class actions. For M&A class actions from 2012-2016:

- Lawyers received nearly two-thirds of the total payments in cases settled or dismissed (both plaintiffs' and defense lawyers), with only 39% going to shareholders. And, of course, the overwhelming majority of cases resulted in disclosure-only settlements, so only a few cases with shareholder awards are responsible for the 39%.
- The average cost of these cases grew 63% during that period.
- The average cost of dismissed M&A cases—which provide no benefit at all to shareholders—rose 162% from 2012 levels to reach $2.3 million in 2016.

Chubb, *Rising Volume and Cost of Securities Class Action Lawsuits is a Growing Tax on U.S. Business, Chubb Data Reveals* (July 10, 2018), http://news.na.chubb.com/2018-07-10-Rising-Volume-and-Cost-of-Securities-Class-Action-Lawsuits-is-a-Growing-Tax-on-U-S-Business-Chubb-Data-Reveals; *see also* Chubb, *From Nuisance To Menace: The Rising Tide Of Securities Class Action Litigation* 4-5 (June 2019), available at http://news.chubb.com/2019-06-11-Chubb-Releases-Report-on-the-Rising-Tide-of-Securities-Class-Action-Lawsuits; Rising Threat, *supra*, at 17.

The new wave of M&A cases filed in federal courts is continuing the pattern of abusive lawsuits. Now, the plaintiffs' bar, rather than entering into a class-action settlement subject to judicial scrutiny, seeks an out-of-court settlement requiring the

defendant to unilaterally add new disclosures to address the supposed "deficiencies" alleged in the class action complaint—which moots the claim—and pay a "mootness fee" to the plaintiffs' lawyers in return for dismissal of the case. As one academic study found, these cases "are almost invariably terminated through a voluntary dismissal coupled with the payment of a mootness fee to the plaintiffs' attorney." Matthew D. Cain et al., *Mootness Fees*, U. Penn. Inst. for L. & Econ. Research Paper No. 19-26, at 4 (May 29, 2019), available at https://ssrn.com/abstract=3398405.

Once again, the principal beneficiaries are the lawyers. In 2017, 89% of all M&A cases were dismissed—and 75% involved payment of a "mootness fee" to the plaintiffs' lawyers. Cain, *supra*, 71 Vand. L. Rev. at 625-26. As another recent academic study has estimated, defendants paid in the aggregate $23.32 million in mootness fees in 2017 alone—which the authors suggest is "a form of blackmail" because it is less costly for defendants to pay the fee than to challenge the complaint on the merits. *Mootness Fees*, *supra*, at 30-31; *see also* Kevin LaCroix*, Mootness Fees: The Latest In The Merger Objection Litigation Phenomenon* (June 10, 2019), https://www.dandodiary.com/2019/06/articles/merger-litigation/mootness-fees-the-latest-in-the-merger-objection-litigation-phenomenon/.

The plaintiffs' bar thus has succeeded in replicating in federal court the very same abusive system that the Delaware Chancery Court sought to eliminate in *Trulia*. And the median fee for plaintiffs' lawyers in these cases was $265,000 in 2017. Cain, *supra*, 71 Vand. L. Rev. at 625-26. That is more than a quarter of a

million dollars simply to file a complaint, which is then dismissed after the defendants issue inconsequential additional disclosures.[3]

For all of these reasons, the district court was plainly correct when it observed that meritless M&A class actions designed to extract fees for plaintiffs' lawyers are nothing more than a "racket." A39 (quoting *In re Walgreen*, 832 F.3d at 724).

II. District Courts Must Use All Available Tools To Police Against Abusive M&A Litigation.

Because of the well-documented harms posed by M&A litigation, this Court should take the opportunity to provide district courts with guidance on the tools that they can—and should—use to address frivolous or improper actions. In light of this continuing and disturbing trend of M&A strike suits, courts must invoke all available tools to detect and sanction abusive filings—because that is the only way to deter future unjustified lawsuits.

First, a district court should, either on request from the defendant or on its own motion, substantially accelerate the briefing and disposition of any motions to dismiss under Rule 12 in order to resolve them as far as possible prior to the closing date of a targeted transaction. As noted above (at 7-8), the whole ball game in these cases is the ability of plaintiffs' lawyers to threaten to disrupt a deal—and extract blackmail settlements—regardless of the merits of the claims. Indeed, these cases largely depend on the assumption that there will never be a hearing on the merits.

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[3] One empirical study of disclosure-only settlements found that the additional disclosures "do not seem to affect shareholder voting on the merger. Insofar as disclosure-only settlements do not provide shareholders with useful information, they are wasteful, clogging the courts and increasing transaction costs for no reason." Fisch, *supra*, 93 Tex. L. Rev. at 561.

Courts should not allow plaintiffs' lawyers to impose such leverage—wholly untethered to whether the lawsuit is justified—and should instead rapidly test the allegations in the complaint against the plausibility standards mandated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Second, district courts should examine these complaints after filing and, if appropriate, issue an order to show cause under Federal Rule of Civil Procedure 11(c)(3) whenever it appears that statements in a complaint run afoul of Rule 11(b)'s standards. Although the process for adjudicating a defendant's motion for sanctions under Rule 11(b) may take too long to be of practical utility in M&A cases, a district court may also, "[o]n its own," "order an attorney, law firm, or party to show cause why the conduct specifically described in the order has not violated Rule 11(b)." Fed. R. Civ. P. 11(c)(3). And the court may then issue monetary sanctions, so long as the show-cause order issues "before voluntary dismissal or settlement" (Fed. R. Civ. P. 11(c)(5)).

Third, district courts also have authority to address litigation abuses broader than the authority set forth in Rule 11. For example, under 28 U.S.C. § 1927, a court may require an attorney who "multiplies the proceedings in any case unreasonably and vexatiously * * * to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In addition, the Supreme Court has explained that a "primary aspect" of courts' inherent authority is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process," which

includes the "assess[ment of] attorney's fees" when a party has acted "in bad faith, vexatiously, wantonly, or for improper reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 45 (1991) (quotation marks omitted). Similarly, courts "may consider collateral issues after an action is no longer pending," including "the imposition of * * * attorney's fees, * * * contempt sanctions, * * *, [and] whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990). While the briefs in this case dispute whether the order under review qualifies as the consideration of a collateral issue under this standard, there is no doubt that, if it does, district courts have authority to enter such orders.

Fourth, in scrutinizing the complaint at the outset of the case, district courts should give heightened scrutiny to M&A filings by serial plaintiffs or plaintiffs' firms. An increasing number of M&A cases are being brought by repeat individuals rather than institutional investors. For example, one press report highlighted a couple who filed *46* such lawsuits. Ton Hals, *TV Stock Picker Leads Onslaught of Class Action Suits*, Reuters (Feb, 18, 2015), https://www.reuters.com/article/lawsuitclassaction-plaintiffs/special-report-tv-stockpicker-leads-onslaught-of-class-action-suits-idUSL4N0VR4DP20150218. And individuals challenging a recent high-profile deal had been involved in nine and 12 securities lawsuits, respectively. *Rosenfeld v. Time, Inc.,* 2018 WL 4177938, at *7, (S.D.N.Y. Aug. 30, 2018). Moreover, a recent report observed that just three plaintiffs' firms have "filed more than *200* federal complaints challenging deals so far this year." Rachel Graf, *Plaintiffs Firms Follow Easy Merger*

Money To Federal Court, Law360 (Oct. 4, 2019), https://www.law360.com/securities/articles/1204171/plaintiffs-firms-follow-easy-merger-money-to-federal-court (emphasis added).

Such repeat plaintiffs and plaintiffs' lawyers should serve as a red flag to the court. Indeed, Congress found in 1995 that the initiative for filing securities class actions came "almost entirely from the [plaintiffs'] lawyers, not from genuine investors," and that "[l]awyers typically rely on repeat, or 'professional,' plaintiffs who, because they own a token number of shares in many companies, regularly lend their names to lawsuits." S. Rep. No. 104-98, at 6. As the above examples make clear, the PSLRA's reforms have not succeeded in preventing professional plaintiffs from filing meritless securities lawsuits.

CONCLUSION

The Court should either affirm or at minimum provide guidance for district courts to follow in policing against meritless merger-objection cases.

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Respectfully submitted.

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Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitations of Rule 29(a)(5) and Circuit Rule 29 because it contains 3,270 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 12 points or larger.

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2019, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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