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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**PORTLAND DIVISION**

**TENREC, INC., et al.**

**Plaintiffs,**

**v.**

**UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,**

**Defendants.**

Case No. 3:16-cv-00995-SI

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

**Oral Argument Requested**

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## ARGUMENT

On the surface, this case represents Plaintiffs' (petitioners Tenrec, Inc. and Walker Macy, LLC, along with their H-1B petitions' beneficiaries, Mr. Sergii Sinienok and Ms. Xiaoyang Zhu, respectively) challenge to the United States Citizenship and Immigration Services' ("USCIS") longstanding interpretation of 8 U.S.C. § 1184(g)(3) (hereinafter, "Section 1184(g)(3)") and the agency's implementation of a random-selection process (or a "lottery") for the hundreds of thousands of cap-subject H-1B petitions the agency often receives within the first five business days for each annual H-1B cap. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B) (hereinafter, "H-1B lottery system"). But Plaintiffs' lawsuit runs deeper than that because it is also a challenge to USCIS's regulation that dictates the agency's procedure for handling excess petitions received after the statutorily mandated H-1B visa caps for each fiscal year have been exhausted.

Believing that they can interpret section 214(g)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1184(g)(3), better than USCIS, and ignoring the realities of why Congress wanted to limit the number of H-1B visa petitions that can be granted for each fiscal year, Plaintiffs seek to establish a perpetual waiting list for each H-1B petition. In essence, Plaintiffs not only disagree with USCIS's H-1B lottery system, but also with a regulation that has existed for decades requiring petitions handled after a fiscal year's cap has been reached to "be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year." 8 C.F.R. § 214.2(h)(8)(ii)(D). To accomplish their goal of establishing a waiting list, Plaintiffs' motion for summary judgment focuses on Section 1184(g)(3)'s language "shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status." Plaintiffs

argue that this language is clear and requires USCIS to accept *all* filings regardless of whether a fiscal year's visa cap has already been exhausted.

Of course, Plaintiffs' emphasis on "in the order in which petitions are filed" makes sense in the narrower context of their own *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*'s "step one" analysis. 467 U.S. 837 (1984). Although they play lip service to the context and purpose of the INA as a whole, their focus on this specific clause does not make much sense to read that language in a vacuum—especially where Section 1184(g)(3)'s remaining statutory language specifically modifies the process of how alien beneficiaries "shall be issued visas (or otherwise provided nonimmigrant status)." Indeed, if Plaintiffs' interpretation were to control, neither USCIS nor the State Department could grant a change of status to the H-1B classification or issue an H-1B nonimmigrant visa, respectively, until each petition had been processed "in the order in which [those] petitions [we]re filed." Plaintiffs style their argument on this point as one of "plain language," but that sort of logjam could not possibly be what Congress intended for Section 1184(g)(3) to accomplish. Instead, the specific context in which the language is used, and the broader context of the statute as a whole, have not been accurately described and Plaintiffs' interpretation is simply too narrow. USCIS's interpretations, on the other hand, are compatible with the purposes of the entire statute and how certain provisions can be implemented in the real world. This is reasonable under *Chevron*.

Finally, Plaintiffs' comparisons of a program for *temporary nonimmigrant* workers to similar statutory language for programs in the *permanent immigrant* visa context of Section 1153(e) or the Diversity Immigrant Visa Lottery, are inapt. These are different contexts with different policy considerations, and Plaintiffs' attempts to rely on selected portions of statutory

language from the immigrant-visa context is mistaken. More importantly, these arguments do not address Section 1184(g)(3)'s statutory gaps and how its language is completely silent regarding (1) what to do with petitions received after each year's fiscal cap has already been reached and (2) how to process hundreds of thousands of petitions received all at once. In short, because Section 1184(g)(3) "is silent or ambiguous with respect to the[se] specific issue[s]," *Chevron*, 467 U.S. at 843, and because these issues are reasonably addressed by 8 C.F.R. § 214.2(h)(8)(ii)(B) and (D), those regulations are entitled to *Chevron* deference, the Plaintiffs' motion for summary judgment should be denied, and Defendants' motion for summary judgment should be granted.

## I. Section 1184(g)(3) Is Ambiguous Regarding How To Process Simultaneously Filed Petitions.

Plaintiffs' core argument is that the H-1B lottery system is incompatible with Section 1184(g)(3)'s language "in the order in which petitions are filed" and how that section does not cap the number of H-1B petitions USCIS may *receive* for each fiscal year. *See* Pls.' Mot. for Summary Judgment at 12 (ECF 31). Accordingly, in Plaintiffs' view, USCIS should simply process each petition in a sequential order, accept *all* filings (even after the statutory cap for that fiscal year has already been reached), and maintain a (never-ending) waiting list for the rest despite the temporary nature of the H-1B nonimmigrant classification. To support this argument, Plaintiffs assert that USCIS assigns sequential numbers USCIS assigns sequential numbers to H-1B petitions in order to run the lottery system.[1] *See id.* at 12–13 (quoting 8 C.F.R.

[1] In fact, these numbers are based on when a petition is entered into USCIS's system, and is in no way reflective of any order of receipt or other sort of priority. This assignment of numbers occurs, in years of extreme demand, after the five-day filing window has already closed. After the

§ 214.2(h)(8)(ii)(B)). Plaintiffs claim that there are "internal inconsistencies" between the aforementioned Section 1184(g)(3) language and the notion of a lottery for H-1B petitions received within the first five business-day window. *Id.* at 13. Plaintiffs also maintain that the current system favors companies with many different business organizations who may file H-1B petitions for the same beneficiary (but for different positions for those same beneficiaries across different corporate entities—that is, different petitioners). *Id.* at 14–15. Again, however, these are policy complaints that ignore how Section 1184(g)(3) is silent regarding both (1) what the agency must do with petitions received after each year's fiscal cap has been reached and (2) how to process a sudden influx of hundreds of thousands of petitions received all at once. Moreover, although Plaintiffs fashion this as a *Chevron* step-one issue, *see id.* at 17–18, they completely fail to address binding Ninth Circuit case law regarding that doctrine.

Plaintiffs lament that other regulatory interpretations they favor have not been adopted, *id.* at 15–17, but admit that USCIS *has* promulgated regulations to address Section 1184(g)(3)'s silence of what to do with petitions received after a fiscal year's cap has been reached and how to equitably handle hundreds of thousands of H-1B petitions received within the same narrow window of time.[2] *See id.* at 18. When courts are confronted with such circumstances, the Ninth

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window has closed, USCIS goes through the petitions to ensure that they are all within the relevant statutory cap. Once identified as cap-subject petitions, they are assigned a number and entered into the lottery system.

[2] Of course, these same regulations also address how to handle an excess amount of petitions received on the day that the statutory cap has reached—even outside of years of extreme demand. In 2009 and 2010, for example, the H-1B cap was not reached until later in the fiscal year. In those circumstances, once USCIS had determined it had received a sufficient number of petitions, it still conducted a lottery for that day to select the last set of petitions. This was because the number of petitions received on those days in 2009 and 2010 exceeded the remaining numbers that could be selected.

Circuit's recent decision in *Oregon Restaurant & Lodging Association v. Perez* controls the manner in which this Court must undertake its *Chevron* step-one analysis. 816 F.3d 1080 (9th Cir. 2016), *reh'g en banc denied*, — F.3d —, 2016 WL 4608148 (9th Cir. Sept. 6, 2016).

In *Perez*, the Ninth Circuit addressed the question of whether a Department of Labor ("DOL") regulation was valid under *Chevron*. *See Perez*, 816 F.3d at 1086–90. The court, faced with a similar "plain language" argument, read a prior holding of the Ninth Circuit interpreting a prior regulation on that issue[3] as rooted in statutory silence rather than in a straightforward implementation of the relevant statute's plain and unambiguous language. *Id.* at 1087. As this district court has previously explained, the *Perez* court was faced with a prior judicial determination

> that a tip pool comprising both customarily tipped and employees and non-customarily tipped employees, did not 'violate section 203(m) of the F[air ]L[abor ]S[tandards ]A[ct], because section 203(m) was silent as to employers who do not take a tip credit' and acknowledged the [DOL's] subsequent promulgation of Rule 2011, "that extended the tip pool restrictions of section 203(m) to all employers, not just those who take a tip credit."

*Allison v. Dolich*, 2016 WL 5539587, at *9 (D. Or. Sept. 28, 2016) (quoting *Perez*, 816 F.3d at 1082).

Facing another challenge to the DOL's most recent regulation on the tip-pooling issue, the *Perez* court engaged in a *Chevron* analysis and found that the agency had the authority to issue Rule 2011 because of the statutory silence regarding that question. *Perez*, 816 F.3d at 1090. Thus, in the Ninth Circuit,

> there is a distinction between … statutory commands and … statutory silence. Moreover, *Chevron* itself distinguishes between statutes that directly address the

[3] *Cumbie v. Woody Woo, Inc.*, 596 F. 3d 577 (9th Cir. 2010).

> precise question at issue and those for which the statute is 'silent.' As such, if a court holds that a statute unambiguously protects or prohibits certain conduct, the court "leaves no room for agency discretion" under [*Nat'l Cable & Telecomm. Ass'n v.* ]*Brand X*[ *Internet Servs.*, 545 U.S. 967, 982 (2005)]. However, if a court holds that a statute does not prohibit conduct because it is silent, the court's ruling leaves room for agency discretion under *Christensen* [*v. Harris Cnty.*, 529 U.S. 576, 588 (2000)].

*Perez*, 816 F.3d at 1088. The *Perez* court "[a]ppl[ied] th[is] reasoning … [to] conclude that section 203(m)'s clear silence as to employers who do not take a tip credit … left room for the DOL to promulgate the 2011 rule. Whereas the restaurants, casinos, and the district court[] equate this silence … to 'repudiation' of future regulation … we decline to make that great leap without more persuasive evidence." *Id.* (citing *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) ("[A] statute's silence or ambiguity as to a particular issue means that Congress has ... likely delegat[ed] gap-filling power to the agency[.]"); *S.J. Amoroso Constr. Co. v. United States*, 981 F.2d 1073, 1075 (9th Cir. 1992) ("Without language in the statute so precluding [the agency's challenged interpretation], it must be said that Congress has not spoken to the issue.")).

In this case, because Section 1184(g)(3) is completely silent regarding waiting lists or what to do when hundreds of thousands of H-1B petitions are received simultaneously, that is enough by itself for this Court to find ambiguity under *Chevron*'s step one. *See Perez*, 816 F.3d at 1089 ("In sum, we conclude that step one of the *Chevron* analysis is satisfied because the FLSA is silent regarding the tip pooling practices of employers who do not take a tip credit."); *cf. Zixiang Li v. Kerry*, 710 F.3d 995, 1000 (9th Cir. 2013) ((holding that USCIS had no duty to approve applications for adjustment of status for immigrant applicants in priority-date order because 8 U.S.C. § 1153(e) was "*silent* about the order in which USCIS must approve

applications for adjustment of status" (emphasis added)). Plaintiffs argue that "[t]he statute … does not permit the agency to refuse to receive petitions when there are not sufficient numbers of H-1B visas." Pls.' Mot. for Summary Judgment at 18. But Plaintiffs argument on this issue makes the same mistake as the Plaintiffs in *Perez* did—isolating a few words of a statute and reading statutory silence as a "repudiation" of future agency regulation. For the many reasons explained in Defendants' Motion for Summary Judgment (ECF 32), Section 1184(g)(3) was simply never intended to be the mandatory mail-intake and processing rule that Plaintiffs insist upon. Congressional silence on the precise manner in which USCIS should handle the hundreds of thousands of petitions it receives every fiscal year[4] does not prohibit the agency from promulgating reasonable regulations of how to fairly administer the H-1B program.

## II. USCIS's Regulations Are Reasonable Under *Chevron*'s Step Two.

Plaintiffs argue against the H-1B lottery system by stating that "even were the statute deemed to be ambiguous, the regulation[s] ha[ve] been subject to multiple proposed regulations [sic] questioning [their] wisdom[.]" Pls.' Mot. for Summary Judgment at 17. This argument against the wisdom of USCIS's system is legally baseless. Under *Chevron*'s step two, courts must examine whether an agency's position is "reasonable" by "look[ing] to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to the legislative purpose and intent." *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 526 F.3d 591, 605 (9th Cir. 2008) (citation omitted). Here, even if Plaintiffs' interpretation may appear to be faithful to the words "in … order," it inevitably would create a never-ending waiting list for H-1B petitions to be adjudicated (oftentimes with years-old labor,

[4] *See, e.g.*, 8 U.S.C. § 1182(n); 20 C.F.R. § 655.730(b).

prevailing wage and employment-related information). Plaintiffs' suggested manner of administration of the H-1B cap is entirely unsuitable to a nonimmigrant worker classification for *temporary* employment and ignores how the H-1B lottery system fills in the statutory silence of how USCIS should fairly place the hundreds of thousands of H-1B petitions it receives simultaneously "in … order."

### *A. Plaintiffs' Comparisons of the Different Provisions for Temporary Non-immigrant Workers to Immigrants Intending to Remain Indefinitely are Inapt*

Although it is not styled as a *Chevron* "step two" analysis, Plaintiffs describe how other "nearly identical" systems for preference immigrant petitions are processed to assert that USCIS's interpretation in the H-1B context is not reasonable. *See* Pls.' Mot. for Summary Judgment at 18–20. Plaintiffs point to similarities regarding the administration of immigrant visas, or USCIS's processing of Form I-140 immigrant petitions under 8 U.S.C. § 1153(e) for what Plaintiffs believe should be done when each fiscal year's H-1B statutory caps have been met. That is, Plaintiffs would prefer the waiting-list interpretation employed when there are no *immigrant* visas left for each year—which results in employment-based visa queues of several years for some immigrants[5]—to apply for H-1B *non-immigrant* temporary worker petitions. *See id.* at 19–22; *cf. also Zixiang Li*, 710 F.3d at 996–98 (describing the system and approach used to give priority dates for immigrant visas). Plaintiffs' complaint that USCIS's refusal to provide for a waiting list is inconsistent when the statutory language of Section 1184(g)(3) contemplates that H-1B petitions be processed "in … order." *See* Pls. Mot. for Summary Judgment at 21–22. But

[5] *See, e.g.*, Visa Bulletin For December 2016, *available at* https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-december-2016.html (indicating, for example, an eleven-year wait time for third-preference alien workers

this sort of conflation ignores the INA's distinction between immigrant petitions for permanent residence or "green cards" (which offer a pathway to citizenship), and non-immigrant petitions that are temporary, that is, permit employment in the United States for a limited purpose and finite period of time. It is the fact that H-1B workers are here for a *temporary* period that explains why each employer's need for that intended employee dissipates (that is, becomes moot) over time. This temporal element will, of course, not be the case for the alien beneficiary of an immigrant petition, which concerns individuals seeking to live in the United States permanently.

Plaintiffs refuse to acknowledge this crucial difference and maintain that "it is Congress which may make the policy decision to change the language of the statute to allow for some other system of apportionment of the limited visa numbers not in the order in which petitions are filed[,]" *id.* at 22, but this again (mis-)reads congressional silence on a matter of logistical administration as a "'repudiation' of future regulation" in a manner that *Perez* has specifically refuted. *See Perez*, 816 F.3d at 1088–89. 8 C.F.R. § 214.2(h)(8)(ii)(D) was designed to allow the agency to process H-1B petitions to fill a temporary need for specialty occupation workers while simultaneously avoid undermining the wages and working conditions of similarly employed U.S. workers—something that Plaintiffs' motion for summary judgment conveniently ignores. Focusing solely on the phrase "in … order" misses the forest for the trees—as the broader structure of the H-1B program was always intended to be for *temporary* employment needs and Congress was well aware of how to provide for a "waiting list" in legislation, *see* 8 U.S.C. § 1153(e), but specifically chose not to provide for one when drafting Section 1184(g)(3). Such

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from India).

statutory "silence is meant to convey nothing more than a refusal to tie the agency's hands[.]" *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009).

And assuming that Plaintiffs' interpretation and approach for a waiting list could be equally consistent with protecting U.S. workers, Pls.' Mot. for Summary Judgment at 25–29, that is completely irrelevant when the agencies' own regulations are themselves already reasonable and in line with the relevant legislative purpose and history. Here again, as long as "the agency's interpretation is a reasonable one, *then it prevails* whether or not there is another interpretation consistent—even more consistent—with the statute." *State of Hawaii ex. rel. Attorney Gen. v. FEMA*, 294 F.3d 1152, 1159 (9th Cir. 2002) (emphasis added). As *Chevron* explained when describing a court's "role in reviewing the regulations at issue," 467 U.S. at 845, "the question [is] not whether in [the court's] view the concept [a]s 'inappropriate' …, but whether the [agency]'s view that it is appropriate in the context of this particular program is a reasonable one." *Id.*

It is impossible to argue that USCIS's preference for recently available data regarding U.S. workers and working conditions, or its regulation to require that petitions not be filed more than six months before the anticipated need, are unreasonable given Congress' repeated limits on the statutory visa caps, as well their emphasis on having DOL certify such information. Plaintiffs may not like the statutory caps, and they may not like the process laid out by the different agencies, but that does not mean that the agencies' approaches are unreasonable. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866. Ultimately, USCIS's interpretation is reasonable when considering other H-1B provisions whose

natural reading require a certain sequence of events (such as certifying labor information) which have been codified by other agencies' regulations.

Plaintiffs' arguments comparing the diversity immigrant visa program lottery to the "lottery" used by USCIS are equally erroneous. *See* Pls. Mot. for Summary Judgment at 23 – 24. Although Plaintiffs attempt to make another *expressio unius* argument here, this is equally resolved by the Ninth Circuit's decision in *Perez*. In particular, Congress, in 1990, anticipated high demand for the Diversity Visa Program and expressly drafted language to process such immigrant visa applications in a random order. The same cannot be said of the H-1B visa petition process, however, and there is nothing instructing USCIS what to do when it receives hundreds of thousands of H-1B petitions simultaneously. Congress chose to be silent in the H-1B context, and left that statutory gap to be filled by the agency, whether through the implementation of a random lottery or a wait list. Put simply: the fact that Congress mandated a random lottery in one context does not mean that they precluded it in another.

Indeed, if Plaintiffs' interpretation of such silence were to control, it would go against the very core of *Chevron* deference—allowing agencies to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or *intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities*." *Chevron*, 467 U.S. at 865–66. In this case, USCIS is typically faced each April with multiple delivery trucks filled with such petitions, and the H-1B lottery system is an entirely reasonable and fair approach for USCIS to implement to process and sort those hundreds of thousands of petitions. In years of less demand, USCIS is nevertheless often faced with receipt of more petitions on the final receipt date than available cap space, and must determine which petitions to accept in the

cap on that day and which to reject. USCIS has determined, based on its expertise and years of administering the H-1B program, that the cap-selection process is a reasonable approach to ensure the fair receipt of cap-subject petitions in a manner consistent with the overall purpose of the H-1B temporary worker program.

### *B. Plaintiffs' Comparisons to Other Numerically Limited Visa Classifications are not Instructive*

Finally, Plaintiffs note that USCIS has implemented a policy of accepting petitions and placing applicants on a waiting list, and not subjecting applicants to a random computer generated lottery, in other numerically limited visa classifications (specifically, the T- and U-visa classifications). *See* Pls.' Mot. for Summary Judgment at 29–31. Plaintiffs argue that because this waiting list is maintained despite the lack of an express statutory mandate that petitions be "processed in the order in which they are filed," the fact that such language is expressly present in the H-1B context requires that a waiting list be maintained for petitions received in the H-1B program. Again, however, the fact that USCIS has chosen to maintain a waiting list for another numerically limited classification in the absence of express statutory language only means that USCIS has the authority to maintain a waiting list when there is no express authority for such wait list. *See Chevron*, 467 U.S. at 865–66. It does not mean that the presence of the language Plaintiffs rely upon mandates that USCIS *must* maintain a wait list. As previously noted, when Congress desires that a waiting list be maintained, it can and will specifically require such expressly in the statute. Therefore, the lack of such express language in the H-1B context means that, while it has the authority to maintain a wait list, USCIS is not *required* to do so. *Cf. Perez*, 816 F.3d at 1088–89.

It is important to also look at the reasons why USCIS decided to maintain a waiting list for the U-visa classification. In promulgating the regulations for the U-visa classification, USCIS noted that

> to balance the statutorily imposed numerical cap against the dual goals of enhancing law enforcement's ability to investigate and prosecute criminal activity and providing protection to alien victims of crime, it will create a waiting list should the cap be reached in a given fiscal year before all petitions are adjudicated. USCIS's goal is to respect the intent of the numerical limitation imposed by Congress while still allowing the legislation to achieve maximum efficacy. USCIS believes that this rule's waiting list methodology will provide a stable mechanism through which victims cooperating with law enforcement agencies can regularize their immigration status.

72 Fed. Reg. 53014, 53027 (Sept. 17, 2007). Given the inordinately different context and statutory goals applicable to this separate nonimmigrant classification, and in the absence of express statutory language *mandating* a waiting list, USCIS balanced the policy goal of the numerical limitations against the policy goals of improved law-enforcement ability to investigate and prosecute criminal activity and protection for victims of crime, and ultimately determined that a waiting list was appropriate. The balance is different here.

Plaintiffs insist that USCIS must take the same approach for the H-visa classification, but ignore how the policy goals regarding law enforcement and protection of victims are not at all present. Instead, the policy goals at hand are balancing Congress' allowance of 65,000 H-1B visas for each fiscal year for temporary workers with the congressional concern for protecting the wages and working conditions of similarly employed U.S. workers. And given the differential in demand for these H-1B visas, it makes perfect sense for USCIS to not maintain a waiting list on petitions that may be multiple years' old before they can be considered and adjudicated. Put another way, allowing petitions for temporary workers to remain on waiting lists for many years

defeats the statutory requirement of requiring H-1B petitioners to demonstrate that workers are being paid the prevailing wages and that the working conditions of such workers will not undermine the wages and working conditions of similarly situated U.S. workers. It would also frustrate the ability of U.S. employers to fill their temporary employment needs, and would necessarily require them to anticipate such needs several years in advance. These are reasonable considerations and precisely the type of concerns that *Chevron* deference was meant to address.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully submit that this Court should deny Plaintiffs' motion for summary judgment.

Respectfully submitted this 14th day of November 2016.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it relates to a Non-Discovery Motion and contains 4,174 words, including headings, footnotes, and quotations, but excluding the caption, signature block, and any certificates of counsel.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2016, I electronically filed the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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