UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL PHILBRICK et al., Plaintiffs, v. ALEX M. AZAR et al., Defendants.	Civil Action No. 1:19-CV-00773 (JEB)

THE NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES' REPLY MEMORANDUM IN SUPPORT OF ITS PARTIAL MOTION FOR SUMMARY JUDGMENT AS TO COUNT II OF THE PLAINTIFFS' COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT.....1

ANALYSIS.....2

I. The Secretary's interpretation that providing medical coverage in a fiscally sustainable way is an objective of the Medicaid Act was permissible.....2

II. The Secretary reasonably concluded that the Granite Advantage Program advances the objective of the Medicaid Act of providing medical coverage to certain populations in a fiscally sustainable way.....6

III. The Effect of Senate Bill 290 on This Litigation.....11

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).....7

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).6

Michigan v. EPA, 135 S.Ct. 2699 (2015) 4–6

Prestera Ctr. for Mental Health Servs., Inc. v. Lawton, 111 F.Supp.2d 768 (S.D. W. Va. 2000).....8

Stewart v. Azar, 313 F. Supp. 3d 237 (2018).....2–3

Statutes

42 U.S.C. § 1315(a), ...4

42 U.S.C. § 1396-1.....1, 3, 6

42 U.S.C. § 1396a(a)(14).....1, 3, 6

42 U.S.C. § 1396a(a)(17).....1, 3–4, 6

42 U.S.C. § 1396a(a)(30)(A).....1, 3–4, 6, 8

S.B. 290, 2019 Sess. (N.H. 2019).....2, 9–13

N.H. Rev. Stat. § 126-AA:2, III(d)(7) 9

PRELIMINARY STATEMENT

The Secretary reasonably concluded that a predominate objective of the Medicaid Act is to provide medical coverage to certain populations in a fiscally sustainable way. That objective is referenced in the Secretary's approval of the Granite Advantage program and is evident in many provisions of the Medicaid Act, including 42 U.S.C. § 1396-1, § 1396a(a)(14), § 1396a(a)(17), and § 1396a(a)(30)(A). Notably, in their Response, the plaintiffs intentionally avoid briefing these statutes, which serve merely as examples of how the Medicaid Act advances the fiscal sustainability objective the Secretary identified in his waiver approval.

In his waiver approval, the Secretary also gave due consideration to concerns about coverage loss. In particular, the Secretary reviewed the Granite Advantage program and explained how the program's many exemptions and exceptions and its provisions providing for an opportunity, after notice, to cure compliance deficiencies would appropriately safeguard against the unwarranted suspension or termination of Medicaid benefits. Additionally, the waiver approval requires New Hampshire to provide appropriate public notice prior to the community engagement requirements going into effect and many other notices as the program proceeds. *See, e.g.*, AR 0029–31.

Moreover, there appears to be no indication in the administrative record, through evidence-based expert studies or otherwise, to suggest that the Granite Advantage program's requirements will result in any number of New Hampshire Medicaid recipients losing their coverage. At best, the administrative record reflects statistics or figures from other states like Kentucky and Arkansas, which had different programs, different populations, and different infrastructures. That is not a sufficient basis to claim that the Secretary did not reasonably and

adequately consider issues related to loss of coverage in his waiver approval determination for the Granite Advantage program.

In sum, the Secretary did reasonably and adequately consider loss of coverage by considering the structure of the Granite Advantage program, including its exemptions, exceptions, opportunity to cure, and many notice provisions. This approval was rational, reasonable, consistent with the law, and was not arbitrary and capricious. It should therefore be upheld, the plaintiffs' motion for summary should be denied, and summary judgment should be entered for the defendants on Count II of the plaintiffs' complaint. [1]

ANALYSIS

I. The Secretary's interpretation that providing medical coverage in a fiscally sustainable way is an objective of the Medicaid Act was permissible.

"Ordinarily, courts review an agency's statutory interpretations using the familiar two-step Chevron framework." *Stewart v. Azar*, 313 F. Supp. 3d 237, 260 (D.D.C. 2018). "That inquiry calls for examining whether 'Congress has directly spoken to the precise question at

[1] A new bill, Senate Bill 290 (2019), which modifies the Granite Advantage program, has been adopted by the New Hampshire House and Senate and is being enrolled for presentation to the Governor, which is expected to occur next week. *See* Exhibit A hereto. Senate Bill 290 amends the Granite Advantage program by including, among other things, self-employment as an option to meet the community engagement requirements, *id.* at Section 1(III)(a), increasing the dependent child exemption "through 12 years of age," *id.* at Section 1(III)(d)(4), requiring suspension instead of termination for failure to meet the community engagement requirements, *id.* at Section 1(III)(b), and, notably, requiring the Commissioner of the New Hampshire Department of Health and Human Services to "waive the application of the work and community engagement requirement . . . or the suspension from coverage for noncompliance for any period of time up to but not after July 1, 2021" upon making certain findings, *id.* at Section 2(X). Senate Bill 290 also requires the Commissioner to seek appropriate approvals from CMS to implement aspects of the bill that may require the existing waiver to be modified. *Id.* at Section 2(IX, XI).

The most recent version of Senate Bill 290 is attached hereto as Exhibit A and is available from the New Hampshire General Court's website at the following address: http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2019&id=895&txtFormat=pdf&v=current (last visited June 28, 2019).

issue,' and, if not, whether 'the agency's answer is based on a permissible construction of the statute.'" *Id.* (internal citations omitted). The parties do not dispute that Congress has not expressly identified the objectives of the Medicaid Act. Thus, the narrow issue in this case is whether the Secretary's construction of the Medicaid Act—that an objective of the Medicaid Act is to provide medical assistance in a fiscally sustainable way—is permissible. *See id.*

The Secretary's interpretation was permissible because it is reflected in numerous provisions of the Medicaid Act. While the plaintiffs refer to "fiscal sustainability" as a "non-statutory objective," ECF No. 35 at 6, numerous statutory provisions within the Medicaid Act, including 42 U.S.C. § 1396-1, 42 U.S.C. § 1396a(a)(14), 42 U.S.C. § 1396a(a)(17), and 42 U.S.C. § 1396a(a)(30)(A), support the Secretary's conclusion and demonstrate that the plaintiffs' position is incorrect as a matter of law. 42 U.S.C. § 1396-1 states that the Medicaid Act exists to provide coverage to certain individuals "as far as practicable under the conditions in each State." It therefore demonstrates that the requirement to provide coverage is not absolute, but is limited by the practicality of providing such coverage. A program that is not fiscally sustainable within the State is not "practicable" and is not capable of ensuring continued medical coverage to vulnerable populations who actually need it. Accordingly, 42 U.S.C. § 1396-1 indicates that fiscal sustainability is not an "independent objective" that can be divorced from the requirement to provide coverage and is not a "second class" objective of the Medicaid Act that can be ignored or superseded by a different or preferred objective.

The Medicaid Act generally, including 42 U.S.C. § 1396a(a)(14), 42 U.S.C. § 1396a(a)(17), and 42 U.S.C. § 1396a(a)(30)(A), permits, and, in some cases, requires, States to manage their Medicaid programs in a fiscally responsible and sustainable way. 42 U.S.C. § 1396a(a)(14) allows states to "provide that enrollment fees, premiums, or similar charges, and

deductions, cost sharing, or similar charges, may be imposed . . . as provided in section 1396o of this title." 42 U.S.C. § 1396a(a)(17) enables states to establish standards "for determining . . . the extent of medical assistance" that beneficiaries receive. And 42 U.S.C. § 1396a(a)(30)(A) ("Section 30(A)") requires states to provide methods and standards relating to the utilization of care and services that safeguard against the unnecessary utilization of such care and services. These statutes support the Secretary's construction that an objective of the Medicaid Act is to provide medical coverage to beneficiaries in a fiscally sustainable way.

Tellingly, the plaintiffs offer no substantive response to the above analysis. Rather, citing *Michigan v. EPA*, 135 S.Ct. 2699, 2710 (2015), the plaintiffs' sole argument is that this Court must completely ignore Medicaid Act provisions that animate the Act's objectives simply because the Secretary did not expressly cite each statutory provision in the waiver approval. ECF No. 35 at 10 n.1. The plaintiffs essentially contend that the Secretary must provide a laundry list of Medicaid Act provisions before anyone can cite to one or more of them as examples of how the Medicaid Act advances an identified objective. That is not the law. It is also not a requirement under Section 1115 of the Social Security Act, 42 U.S.C. § 1315(a), or United States Supreme Court jurisprudence.

While it is "true that a [C]ourt may uphold agency action only upon the grounds on which the agency acted," *Michigan*, 135 S.Ct. at 2710, the agency acted on the ground that the fiscal sustainability of the Medicaid program was a valid objective of the Medicaid Act. Thus, so long as the Medicaid Act itself advances that objective (and it does), the defendants are not prohibited from citing to examples of the Medicaid Act that animate that objective.

The plaintiffs' reliance on *Michigan* does not support a contrary result. *Michigan* concerned the provision of the Clean Air Act regarding power plants. *Id.* at 2705. Specifically,

the Clean Air Act directed the EPA to regulate power plants if the EPA found, after considering the results of a public health study, that "regulation is appropriate and necessary." *Id.* (citing 42 U.S.C. § 7412). The EPA interpreted the phrase "appropriate and necessary" to exclude all considerations of cost, noting "'costs should not be considered' when deciding whether power plants should be regulated under" the statute. *Id.* (internal citations omitted). The EPA estimated the benefits of the proposed regulation of power plants would yield $4 to $6 million in benefits per year, but cost the industry an estimated $9.6 billion annually. *Id.* at 2706. The EPA, in its regulatory impact analysis, projected the regulation would have $37 to $90 billion in ancillary benefits—such as "cutting power plants' emissions . . . ." *Id.* at 2706. However, the EPA was clear that the regulatory impact analysis "played no role" in determining whether regulation was appropriate and necessary because it did not interpret the statute to require consideration of cost. *Michigan*, 135 S.Ct. at 2706 (internal quotations and citations omitted).

The Supreme Court held that implicit in the phrase "appropriate and necessary" was a consideration of cost. *Id.* at 2707. Accordingly, the Supreme Court held "it was unreasonable for the EPA to read § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants." *Id.* at 2711. In a dissenting opinion, Justice Kagan disagreed, suggesting the EPA did not need to "explicitly analyze cost" before determining whether regulation was "appropriate and necessary" under the statute because the EPA considered costs at a later stage of the regulatory process. *Id.* at 2714. However, the majority noted that the EPA did not consider cost at all in deciding *whether* to regulate in the first instance—cost bore no part of the EPA's analysis whatsoever. *Id.* at 2711. Citing the general rule of administrative law that "a court may uphold agency action only on the grounds that the agency invoked when it took the action," the majority observed it could not uphold the EPA's decision to regulate power plants

because EPA considered cost *after* deeming regulation "appropriate and necessary," when the statute required consideration of cost in the first instance. *Id.* at 2170–11. As the EPA's statutory construction explicitly rejected that cost was to be a factor in its statutory analysis, post-hoc considerations of cost could not save the EPA's initial decision to regulate the industry without factoring in cost. *Id.*

Thus, *Michigan* simply stands for the general proposition that this Court may only uphold agency action based on the rationale articulated when the agency took the action. In this case, the Secretary's rationale for granting the waiver was that Granite Advantage promotes the objectives of the Medicaid Act, including the objective of providing coverage in a fiscally sustainable way. Contrary to the plaintiffs' suggestion, this is not a case of "post hoc rationalization" for agency action. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action."). Rather, a primary issue before the Secretary was the interpretation of the objectives of the Medicaid Act, and the Secretary interpreted the Medicaid Act to include the objective of furnishing medical assistance in a fiscally sustainable way. As 42 U.S.C. § 1396-1, § 1396a(a)(14), § 1396a(a)(17), and § 1396a(a)(30)(A) are plainly part of the Medicaid Act, the Court may consider these provisions in determining whether the Secretary's interpretation was a permissible construction of the Act.

II. The Secretary reasonably concluded that the Granite Advantage Program advances the objective of the Medicaid Act of providing medical coverage to certain populations in a fiscally sustainable way.

Michigan does not require the Secretary to cite to every statutory provision in the Medicaid Act that supports his conclusion that the Medicaid Act advances the objective of

providing medical coverage in a fiscally sustainable way.[2] In granting the waiver approving the Granite Advantage program, the Secretary was only required to "articulate a 'rational connection between the facts found and the choice made.'" *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). "While [the Court] may not supply a reasoned basis for the agency's action that the agency itself has not given, [the Court] will uphold a decision of less than ideal clarify if the agency's path may reasonably be discerned." *Id.* at 285–86.

That path is reasonably and easily discernible in this case. In approving the Granite Advantage program, the Secretary determined that an objective of the Medicaid Act is to provide medical coverage to certain populations in a fiscally sustainable way and that the Granite Advantage program promotes that objective. The Secretary found, among other things, that the Granite Advantage program would improve beneficiary health and increase financial independence which, in turn, would "promot[e] Medicaid's purpose of helping states furnish medical assistance by allowing New Hampshire to stretch its limited Medicaid resources." AR 0006. The Secretary expressly noted that "[h]elping the state stretch its limited resources will assist in ensuring the long-term fiscal sustainability of the program and preserv[e] the health care safety net for those New Hampshire residents who need it most." AR 0006 (emphasis added). Further, by "enhancing fiscal sustainability," the Granite Advantage program could "provide services to Medicaid beneficiaries that it could not otherwise provide," thereby providing "greater access to coverage for low-income individuals than would be available absent the demonstration." *See id.* For the reasons stated in New Hampshire's brief, the Secretary's

[2] Notably, the plaintiffs do not take issue with New Hampshire's citations to various case law in its brief that supports the Secretary's statutory construction, *see* ECF Doc. 35 at 10 (addressing merits of cases cited by New Hampshire), even though the citations were not included in the Secretary's letter approving the Granite Advantage program. *Compare* AR0001–14 *with* ECF No. 32-1.

conclusions are well supported by the administrative record, the plain language of the Medicaid Act itself, and must therefore be upheld.

The plaintiffs do not dispute, in substance, that an objective of Medicaid is to furnish medical assistance in a fiscally sustainable way, including by preventing the unnecessary utilization of services. 42 U.S.C. § 1396a(a)(30)(A). As noted, the "unnecessary utilization" provision of Section 30(A) "is intended, as appears on its face, to contain costs and guard against fraud." *Prestera Ctr. for Mental Health Servs., Inc. v. Lawton*, 111 F.Supp.2d 768, 776 (S.D. W. Va. 2000). The Secretary reasonably concluded that the Granite Advantage program was designed to provide coverage to low-income, able-bodied adults in a fiscally sustainable way, by requiring them to pursue opportunities that may lead to financial independence. Consistent with Section 30(A), the Granite Advantage program is designed to safeguard against the unnecessary utilization of Medicaid care and services by persons who are capable of achieving financial independence.

Nonetheless, the plaintiffs repeat their concern that the Granite Advantage program will lead to coverage loss. But as the Secretary reasonably concluded, the Granite Advantage program includes exemptions and exceptions to ensure that those vulnerable persons who are unable to achieve financial independence, either temporarily or permanently, will remain within the safety net program. The Granite Advantage program also contains an opportunity to cure any non-compliance and has ample notice provisions built into it. Thus, the only way the requirements of the Granite Advantage program may impact overall coverage levels "is if the individuals subject to the requirements choose not to comply with them." AR 0006.

Indeed, while the plaintiffs continue to suggest that they are "likely to experience gaps in coverage," ECF Doc. No. 35 at 4–5, it appears that three out of the four plaintiffs (Mr. Philbrick,

Ms. VLK, and Mr. VLK) are already either meeting the requirements or have obtained an exemption from the requirements. *See* Exhibit B, Declaration of Henry Lipman in Support of the New Hampshire Department of Health and Human Services' Reply Memo. in Support of its Partial Mot. for Summ. J. as to Count II of the Pls.' Compl. ("Lipman Decl.") ¶¶ 3(a–d). Mr. Philbrick is meeting the work or community engagement requirements of the Granite Advantage program and has reported past employment of 125.5 hours per month based on verified pay stubs. *Id.* ¶ 3(a). Those hours will be re-determined in December 2019, unless Mr. Philbrick has a significant change in employment circumstances that he is required to report to the Department prior to that time. *Id.* In other words, absent a significant change in employment circumstances, Mr. Philbrick does not have to report his hours to the Department again until December 2019. *Id.* Mr. VLK has obtained an exemption because he is exempt in the Supplemental Nutrition Assistance Program (SNAP). *Id.* ¶ 3(c). Ms. VLK has also obtained an exemption by verifying her medical frailty. *Id.* ¶ 3(b)[3]; *see* N.H. Rev. Stat. § 126-AA:2, III(d)(7) (medical frailty exemption).

The only plaintiff to date that has not reported hours or otherwise documented that he qualifies for an exception or exemption from the program is Mr. Ludders. Exhibit B, Lipman Decl. ¶ 3(d). Mr. Ludders has "chosen to live a subsistence lifestyle that prioritizes meeting many of [his] basic needs by living off the land." ECF Doc. No. 19-3 ¶ 3. While he works many different time-limited, seasonal jobs, *id.* ¶¶ 4–7, his "time off in between paid jobs is important . . . because it allows [him] to focus on subsistence activities." *Id.* ¶ 8. In other words, Mr. Ludders

[3] Ms. VLK had previously been exempt from the work or community engagement requirements because she cares for a dependent child under 6 years of age. Exhibit B, Lipman Decl. ¶ 3(b). Should Senate Bill 290 become law, that exemption, should Ms. VLK require it again, will extend until her child is 13 years old. *See* Exhibit A, SB 290 at Section 1(III)(d)(4).

does not appear to have an "inability" to meet the work or community engagement requirements, as the plaintiffs' briefing suggests, ECF Doc. No. 35 at 5; rather, he appears to be choosing not to meet the work or community engagement requirements in order to maintain his preferred subsistence lifestyle.

Thus, despite the plaintiffs' repeated concerns about potential gaps in coverage for them, the only plaintiff who is at risk of losing coverage is the one plaintiff who has chosen not to engage the Granite Advantage program's requirements due to his chosen subsistence lifestyle.[4] The Secretary's decision has therefore proven itself to be well-considered: The requirements of the Granite Advantage program are not onerous, AR 0007, the exceptions and exemptions the program provides serve as appropriate safeguards, AR 0005, and the only persons likely to experience gaps in coverage are persons who choose not to comply with the requirements. *Id.* at 6.

The Medicaid Act was not designed to subsidize the particular chosen lifestyles of non-disabled, able-bodied adults. Indeed, it is manifestly *not* one of the objectives of the Medicaid Act to enable non-disabled, able-bodied adults to live subsistence lifestyles. As the Secretary correctly found, a predominate objective of Medicaid is to furnish medical assistance to certain populations in a fiscally sustainable way; this includes in a way that prevents the unnecessary utilization of services, such as preventing the use of a Medicaid safety net by persons who, despite being capable of achieving financial independence, would prefer to utilize the safety net indefinitely to pursue a chosen lifestyle.

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[4] Should Senate Bill 290 become law, Mr. Ludders may also be able to obtain relief from the work and community engagement requirements, depending on circumstances not fully reflected in his declaration and that may exist in or around the area where he resides. *See* Exhibit A, SB 290 at Section 2(X)(c) (permitting the Commissioner to consider, in waiving the community engagement requirement, "[t]he impact of seasonal employment opportunities on the ability of members to achieve the minimum hours for qualifying activities").

In short, the Secretary reviewed the Granite Advantage program fully and in a detailed manner and reasonably concluded that it promoted one of the core objectives of the Medicaid Act by providing coverage to certain populations in a fiscally sustainable way. The Secretary's decision was therefore rational and reasonable, supported by the administrative record, and should be upheld.

I. The Effect Of Senate Bill 290 On This Litigation.

Senate Bill 290 has passed the legislature and will be enrolled for presentation to the Governor next week. If it is signed into law, the Granite Advantage program, particularly as it relates to compliance with the work or community engagement requirements, will be modified. Non-compliance with the work or community engagement requirements will result in suspension of benefits, not termination of them. Exhibit A, SB 290 at Section 1(III)(b). The options for meeting the work or community engagement requirements will be expanded to include self-employment, *id.* at Section 1(III)(a), and participation in "recovery activities and/or mental health treatment . . . ." *Id.* at Section 1(III)(a)(12). The exemptions will expand to include persons who are custodial parents of a dependent child "through 12 years of age" and will expand to 2 parents or caretakers where the responsibility for the child "is shared by the 2 parents or caretakers." *Id.* at Section 1(III)(d)(4). The exemptions will also expand to cover the homeless, as defined by the McKinney-Vento Homeless Assistance Act of 1987. *Id.* at Section 1(III)(d)(9).

Senate Bill 290 will also *require* the Commissioner of the New Hampshire Department of Health and Human Services to waive application of the work or community engagement requirements "up to but not after July 1, 2021, upon a finding that one or more of the following

circumstances impact a substantial number of program members who are mandatory for the requirement:

(a) The inability to communicate verbally and in writing and directly counsel all members who are mandatory for the requirement and not already exempted or are in compliance in accordance with the rules of the work and community engagement requirement adopted under 541-A.

(b) The unavailability of qualifying activities in any region of the state that may result in a disproportionate impact upon program members located elsewhere.

(c) The impact of seasonal employment opportunities on the ability of members to achieve the minimum hours for qualifying activities.

(d) The inability to achieve the minimum hours of qualifying activities after taking into account all applicable exemptions despite good faith efforts to comply.

(e) The unavailability of transportation and other supports for members who are not eligible for assistance through granite workforce.

(f) Other unforeseen circumstances that impact the administration and verification of the program and that more likely than not would cause members to be suspended from the program.

Id. at Section 2(X).

Senate Bill 290 also permits the Commissioner to "submit an amendment to the program waiver (CMS# 11-W-00298/1) to incorporate the authority to waive the suspension of coverage consistent with the [above] provision, to the extent required by the Centers for Medicare and Medicaid Services." *Id.* at Section 2(XI). Other amendments to the existing program waiver (CMS# 11-W-00298/1) may also need to be submitted to the Federal Defendants to address other changes reflected in Senate Bill 290.

Consequently, should Senate Bill 290 become law, it will materially change the Granite Advantage program as it currently exists and may require the Federal Defendants to re-examine the approved waiver presently under review by this Court. Such a result

may moot this case or justify a stay of this action until further review by the Federal Defendants is completed. The New Hampshire Department of Health and Human Services will notify the Court and the parties in this matter promptly should Senate Bill 290 be signed into law by the Governor.

CONCLUSION

The Court should reject the plaintiffs' invitation to ignore provisions of the Medicaid Act that do not support the plaintiffs' narrative. When considering the Medicaid Act as a whole, it is clear that the Secretary's construction that a predominate objective of the Medicaid Act is to provide medical coverage in a fiscally sustainable way was permissible. For the reasons stated herein and in New Hampshire's initial brief, the Secretary's determination that Granite Advantage promotes that objective was not arbitrary or capricious, and must therefore be upheld. Accordingly, the Court should enter an order granting the New Hampshire Department of Health and Human Services' motion for partial summary judgment as to Count II, and denying the plaintiffs' motion for summary judgment.

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

By its attorney,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

Dated: June 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ECF on June 28, 2019, to counsel of record.

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