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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM DEANS, an individual, Plaintiff, vs. LAS VEGAS CLARK COUNTY LIBRARY DISTRICT, *et al.,* Defendants.	Case No. 2:16-cv-02405-APG-PAL

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AS TO DEFENDANTS COLLEGE OF SOUTHERN NEVADA, OFFICER ANTONIA SUMMERLIN, AND OFFICER RANDALL PERKINS

1.0 INTRODUCTION

Plaintiff seeks to enjoin Defendants from enforcing an unlawfully issued Notice of Trespass against Plaintiff, barring him from any library in Clark County for a period of at least one year, and also enjoining Defendants from enforcing an unconstitutional policy restricting all petitioning activity to a designated "spot." Further, as the provisions of the LVCCLD's procedures are unconstitutional and CSN is the entity in control of the property, the Court should compel CSN to cease any further infringement upon Deans's rights, thereby compelling its lessee, LVCCLD, to abide by the First Amendment.

2.0 FACTUAL AND PROCEDURAL BACKGROUND

2.1 Deans's Encounter at the Library

On October 13, 2016, Plaintiff positioned himself outside the West Charleston Public Library in Las Vegas, Nevada (the "Library"). (*See* Doc. No. 3-1 at ¶¶7-11.) He did not disturb anyone. (*Id.* at ¶11; *see* Declaration of Steven Cooper ["Cooper Decl."], attached as **Exhibit 1**, at ¶8-9, 13-14).[1] Defendants admit this when they allege he was "standing directly in front of the entrance, **approximately sixteen (16) feet from the doors.**" (*See* Doc. No. 11 at 3) (emphasis added.) Plaintiff circulated a petition and told people how to register to vote. (Doc. No. 3-1 at ¶¶6, 12, & 13.)

Security Officer Phyllis Del Soldato approached Plaintiff and stated that she was acting in her official capacity as a representative of Defendant LVCCLD. (*Id.* at ¶17.) Soldato told Plaintiff that he could not engage in his free speech activity without first **registering** with the LVCCLD. (*Id.* at ¶18.) Assistant Branch Manager Sam Kushner, and Branch Manager Florence Jakus, informed

[1] Defendants claim that Deans was blocking the entrance of the Library, but have provided no evidence of this. This is not a credible assertion, given that the Notice of Trespass states its basis as "failure to comply with staff instruction." (*See* Doc. No. 3-3.) This is so even though the a more specific Library Rule of Conduct explicitly prohibits "[r]estricting access to entrances, exits, and/or library resources." (*See* Doc. No. 11-5.) Furthermore, the incident report does not at any point assert that Deans was impeding anyone from entering or exiting the Library. (*See* Incident Report, attached as **Exhibit 2**.)

him that **if he was approved**, he would have to relocate to a spot at the outer perimeter of the Library entrance plaza, with significantly less pedestrian traffic. (*Id.* at ¶21-23; *see also* Doc. No. 3-2.)[2]

Plaintiff informed Kushner and Jakus it was a violation of his First Amendment rights to require registration. (Doc. No. 3-1 at ¶24.) Kushner and Jakus summoned CSN police. (*Id.* at ¶24.) The officers arrived, including Defendant Summerlin. Summerlin stated that Deans had to leave the Library premises. (*Id.* at ¶25 & 26.) She claimed that she was the "duly appointed representative of the owner of the public library." (*See* transcript of video recording of library plaza encounter, attached as **Exhibit 3** at 3.)[3] Despite Defendants' *post hoc* representations, this Notice of Trespass was issued because he questioned the responding police officers and library personnel. (*See* Doc. No. 3-3; Doc. No. 11-5; **Exhibit 2**; **Exhibit 3** at 2.) CSN then issued an unlawful Notice of Trespass for "failure to comply with staff instruction." (*See* Doc. No. 3-1. at ¶¶28-29; *see also* Doc. No. 3-3.) The Notice forbids Deans from visiting **any** branch of the LVCCLD for at least one year, under threat of arrest. (*Id*; Doc. No. 3-1 at ¶¶31 & 33.)

Deans then went to the CSN Police Department office to appeal the decision. (*Id.* at ¶35.) Shortly thereafter, he received a call from Lieutenant Randall Perkins with CSN. (*Id.* at ¶39.) Perkins informed Deans[4] that he would not lift the order and permit Deans to continue exercising his rights pending the outcome of the investigation. (*Id.* at ¶41.) Perkins also stated that if the investigation was inconclusive, he would uphold the trespass order. (*Id.* at ¶42.) This presumption is a derogation of Deans's First Amendment rights. Perkins then informed Deans that the investigation would conclude by Oct. 25, 2016 at the earliest, and Nov. 11, 2016 at the latest. (*Id.* at ¶43.)

3.0 STANDARDS FOR OBTAINING INJUNCTIVE RELIEF

The traditional test in *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) and *FDIC v. Garner*, 125 F.3d 1272, 1277 (9th Cir. 1997) and *Metro Pub. Ltd. v. San Jose Mercury News*, 987 F.2d

[2] That spot was defined by Kushner as the area shown in Doc. No. 11-7. Since the TRO hearing, however, counsel for LVCCLD has provided a different interpretation of the spot.

[3] Deans has provided all parties with a copy of the underlying video recording, and it will be filed with the Court to be played during the hearing.

[4] Deans, through counsel, requested that the trespass be lifted pending the outcome of the appeal.

637, 639 (9th Cir. 1993) is met. If the balance of hardships strongly favors the plaintiff, he does not need to make as strong a showing of success on the merits, and vice versa. *See Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). When there is a violation of a constitutional right, no further irreparable injury is required. *See Assoc. Gen'l Cont. of Calif. v. Coal. for Ec. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). In fact, the first prong of the "traditional" test is outcome determinative in First Amendment cases, as any chill to First Amendment rights is irreparable harm, the government has no interest in enforcing an unconstitutional regulation, and the public does not benefit by enforcement. *See Kroll v. Incline Vill. Gen. Improvement Dist.*, 598 F. Supp. 2d 1118, 1126 (D. Nev. 2009).

4.0 ARGUMENT

Defendants argue "CSN has no interest in or stake in defending the Library District's Notice of Trespass. Officer Summerlin enforced Nev. Rev. Stat. 207.200 . . . at the request of the property lessee-occupant." (Doc. No. 10 at 3:26-28.) They also claim that CSN has no "interest or stake in applying Nev. Rev. Stat. 293.127565. Library District is the lessee-occupant of the designated library grounds and applies Nev. Rev. Stat. 293.127565 independent from CSN." (*Id.* at 4:1-3.) CSN cannot evade responsibility so easily. These assertions are belied by the facts. Officer Summerlin stated that she was acting "as duly appointed representative of the owner of the property of the public library" when she issued the Trespass. (**Exhibit 3** at 3.) Absent injunctive relief, there is nothing other than their word that prevents them from arresting Deans if he goes to any public library. As the enforcer of LVCCLD's policies, and the owner of the subject property, injunctive relief is just as necessary against CSN and its officers.

The lease requires LVCCLD to "keep and maintain the premises . . . in compliance with all existing or hereafter enacted laws, statutes, ordinances, order, rules and regulations . . . ." (*See* Library lease, attached as **Exhibit 4**, at § X.) LVCCLD, by unlawfully stifling petitioning activity, is violating the First Amendment. CSN, as the landowner, has the power and the **responsibility** to prevent LVCCLD from violating the First Amendment. If LVCCLD were committing other unlawful acts, like impeding handicapped access, CSN could not claim to have no dog in the fight.

One of the explicit bases cited for restricting Deans's activity is NRS 293.127565. Though CSN and its officers do not provide much of a defense for the erroneous interpretation of this statute (that it **restricts** petitioning activity), this interpretation is central to this case. LVCCLD may defend its policies, but CSN and the State of Nevada are the proper parties to defend the state statute.

If LVCCLD's interpretation of NRS 293.127565 is correct, the Court should strike the statute down as unconstitutional unless the State can defend it. LVCCLD's arguments ensure that CSN must remain a party unless the State of Nevada endorses the proper interpretation of NRS 293.127565.

4.1 NRS 293.127565 Does Not Restrict Petitioning Activity

LVCCLD claims that its actions were taken under the blessings of NRS 293.127565. CSN and its officers issued a notice of trespass against Deans for failing to conduct his activities within a designated "petitioning spot."

The statute creates an **affirmative obligation** on the part of government entities to set aside an area in which people petition, even at buildings that are not traditional public fora. It **creates** a limited public forum in areas that are otherwise nonpublic fora. The statute does not, however, mandate a restriction on petitioning to *only* these designated spots. To interpret the statute in this way would make it facially unconstitutional, as it would restrict such activity in all public fora. The statute creates a floor, not a ceiling, for petitioning activity. *See Univ. & Cmty. College Sys. Of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712 (2004) ("NSG"). The Nevada Supreme Court discussed NRS 293.127565, but the government did not rely on the statute as a basis for **restricting** speech. They argued that they could impose reasonable restrictions *despite* NRS 293.127565. *See id.* at 725 (appellant conceding that 293.127565 creates a limited public forum at public buildings, regardless of the building's use).

Looking at the statute's legislative history, the court found that:

> NRS 293.127565(1)(c) expresses the state's public policy that election laws . . . should be liberally construed to effectuate the will of the people. Correspondingly, any time, place, or manner restriction associated with buildings to which NRS 293.127565 pertains must not work unreasonably, in light of the totality of the circumstances, so as to deny a petition circulator his or her right to gather signatures.

Id. at 734. The purpose of the statute is "to provide petition circulators areas at public buildings in which to conduct signature-gathering activities." *Id.* at 735. Accordingly, any restrictions on such activities at a public building "under the statute's purview must also comport with the spirit and intent of NRS 293.127565 in light of the particular circumstances." *Id.* at 736. Nothing in the statute **restricts** an individual's right to circulate petitions.

4.2 Plaintiff is Likely to Prevail on the Merits of His Free Speech Claims

Defendants' violated Deans's constitutional rights by issuing a Trespass. This retaliatory conduct violates Deans's rights under the First Amendment, remedied under 42 U.S.C. § 1983. Courts evaluate a First Amendment claim as follows: (1) whether the speech is protected; (2) the nature of the forum; and (3) whether the government justification is satisfactory. *See Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 797 (1985). Defendants do not question whether Deans's activities are protected Political speech. "The solicitation of signatures for a petition involves protected speech." *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988). Telling other citizens to register to vote, and telling them how to do so, hits the bullseye of the First Amendment.

4.2.1 The Plazas Are Traditional or Designated Public Fora[6]

The Ninth Circuit has a three-factor public forum test: "1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and 3) [the] traditional or historic use of both the property in question and other similar properties." *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003).

A public library may contain different types of public fora. *See* California case of *Prigmore v. City of Redding*, 211 Cal. App. 4th 1322 (2012). As here, *Redding* dealt with organizations that wished to petition in the **outdoor areas** of a public library, specifically a "covered area of approximately 765 square feet [with] two cement columns, a sculpture, several benches, and a newspaper rack."

[6] As far as a facial challenge to NRS 293.127565 (as interpreted by Defendants) is concerned, this determination is a foregone conclusion; the statute applies to **all** public buildings, including those that are unquestionably traditional public forums.

Id. at 1328. Given the differences between the interior and exterior areas of the library, the court found that "a 'more tailored approach'" to the public forum analysis was appropriate. *Id.* at 1338. The *Redding* library, just like the Library here, offered "complete, unrestricted public access" to the outdoor area, and an entrance "larger than the typical sidewalk and includes several benches and a newspaper rack. It is an area where people can rest or congregate for lengthy conversation." *Id.* at 1339. The court found that "[c]haracterizing the area as a public forum is consistent with the role of a library as 'a mighty resource in the free marketplace of ideas. It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech.'" *Id.* (quoting *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582083 (6th Cir. 1976)). The court distinguished the library "from, for example, stand-alone retail establishments that do not invite people to congregate, to meet friends, rest, or be entertained, and are not public forums." *Id.*

The facts here match *Redding*. The plaza is an open area that is larger than any sidewalk. It contains places to sit and a circular area larger than necessary to allow ingress and egress. The circular center is designed in such a way to evoke the impression of a traditional Greek or Roman forum. This Court observed that the plaza "**appears to be, on the one hand, designed as a gathering space, aesthetically pleasing, but also potentially to exchange ideas that one just learned studying inside the library**." (*See* transcript, attached as **Exhibit 5** at 54:14-17) (emphasis added.) There are no physical barriers impeding access to the Library. These physical characteristics indicate that the area is meant for unrestricted public access, and is thus a traditional public forum. Additionally, the library is connected to the CSN campus, across street from Bonanza High School, one block from Fighters Memorial Park, and two blocks from Gary Dexter Park, all public buildings or places. Though it may not be at the nerve center of CSN's campus, its location also suggests that the plazas are part of a traditional public forum. There is evidence that the plazas, if not the entirety of the Library, are regarded as a traditional or designated public forum. LVCCLD has stated that it

> provides welcoming and inspiring spaces for reading, learning and achieving, and the tools and resources that families, children, teens and adults need to succeed. The Library is committed to building communities of people who can come together to pursue their individual and group aspirations.

(*See* LVCCLD Collection Development Policy, Mission Statement, attached as **Exhibit 6**.) It claims that "[t]he District is guided by the principles of Public Librarianship and First Amendment Rights. The District protects library materials from censorship." (*Id.*) It "seek[s] innovative ways to . . . [c]reate a sense of community by providing a welcoming, inviting, secure environment for our public and staff." (*Id.*)[7] Clark County libraries are intended to be traditional or designated public forums.

Portions of Clark County public libraries have been intended to be public forums for over a decade. In 2004, a member of the LVCCLD Board of Trustees went on record stating all speakers must be treated equal because "[p]ublic forums cannot be regulated by content and use, only when, where and how can be regulated." (June 10, 2004 Board of Trustees' Meeting Minutes, attached as **Exhibit 7**, at 6.)[8] And in 2011, when discussing a rule regarding searches of library patrons, a board member noted "that the District has one of the most lenient entrance policies as a government agency." (January 13, 2011 Board of Trustees' Meeting Minutes, attached as **Exhibit 8**, at 10.)[9] If entry to the building is so lenient, the plaza outside must be more so.

Finally, the Library is located on CSN's campus. Counsel for CSN stated that the college does not restrict petitioning activities to "public speech zones." (*See* **Exhibit 5** at 19:15-18, 22:4-7.) He said that "**the whole campus is a free speech zone**." (*Id.* at 24:5-7) (emphasis added.) CSN's Opposition states that "CSN has adopted the policy that all outside areas are available for free speech activity subject to requirements that it not unduly impact its primary educational purpose." (Doc. No. 10 at 4:5-8.)

"[T]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972). "The college classroom and its environs is peculiarly the 'marketplace of ideas," *Id.* The mere "undifferentiated fear of

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[7] The Court should note, as explained in the Reply concerning LVCCLD, that the Library District makes these aspirational statements easily available to the public, while the details of their restrictive policies are much more difficult to obtain.

[8] Available at: http://www.lvccld.org/about/board/2004/minutes/06_10_04_minutes.pdf (last accessed Oct. 26, 2016).

[9] Available at: http://www.lvccld.org/about/board/2011/minutes/01_13_11_1_minutes.pdf (last accessed Oct. 26, 2016).

apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus." *Healy*, 408 U.S. at 191. The fact that CSN considers the entirety of the CSN campus a "free speech zone," and the Library is located on CSN's campus, mandates that these open plazas are traditional, or at least designated, public fora.

This Court noted a potentially adverse case on this question, *United States v. Kokinda*, 497 U.S. 720, 727-28 (1990). *Kokinda* is not binding on this point. The portion of the plurality opinion that held the post office sidewalk was a 4-member plurality, with Justice Kennedy finding it unnecessary to decide this issue in light of the reasonable time, place, and manner restrictions in the case. *See id.* at 739 (Kennedy, J., concurring). The other four justices disagreed and felt the sidewalk was a traditional or designated public forum. *See id.* at 593 (Brennan, J., dissenting). As this issue was considered by a divided court and not actually decided, the plurality's decision on whether sidewalks outside a post office are a limited public forum is non-binding dicta.[10]

Even if *Kokinda* were binding, it is distinguishable. There is no mention of an enormous plaza in front of the *Kokinda* post office with benches for people to congregate, and "discuss what they learned in the post office." There are no statements from the government regarding the historically open use of the sidewalks. The plurality placed weight on the fact that "postal property is expressly dedicated to only one means of communications: the posting of public notices on designated bulletin boards." *Id.* at 730. LVCCLD's and CSN's own policies undermine any comparison between this case and *Kokinda*.

4.2.2 If Applicable, NRS 293.127565 is Unconstitutional

4.2.2.1 Prior Restraint

"As a starting point, one must assume the general principle that, under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception." Thomas I. Emerson, "The Doctrine of Prior Restraint," YALE FACULTY SCHOLARSHIP SERIES, Paper 2804 at 655 (1955). Prior restraints turn that principle on its head. There are generally

[10] And frankly, Brennan's opinion is more compelling.

two kinds of prior restraints: those that "'authorize a licensor to pass judgment of speech' and those whose purpose 'is not to exclude communication of a particular content, but to coordinate multiple uses of limited space' on a content-neutral basis." *Seattle Affiliate*, 550 F.3d at 797 (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002)). As explained in Section 5.2.2.2, *infra*, the restrictions here are content-based.[11] There is also a third type of prior restraints

> which make unlawful publication or other communication unless there has been previous compliance with specific conditions imposed by legislative act. In this situation, no approval of an executive or judicial official is involved. Examples of such restraint are those requiring registration or lobbyists or of certain political organizations. Laws imposing taxes on newspapers or other forms of communication may be said to fall within this category. Enforcement of the control is normally by criminal prosecution or other legal proceeding for failure to meet the condition.

Emerson, *supra*, at 656.

Any rule requiring registration before authorizing public advocacy is a prior restraint. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).[12] "**Advance notice or registration requirements [can] drastically burden free speech**." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981) (emphasis added). "It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible. v. Stratton,* 536 U.S. 150, 165-66 (2002). This places a burden on the exercise of free speech, and absolutely bans spontaneous speech. *See id.*

Requiring pre-notification is only permitted where "there are procedural safeguards that ensure that the decision maker approving the speech does not have 'unfettered discretion' to grant or deny permission to speak." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795 (7th Cir. 2016). "A licensing statute placing unbridled discretion in the hands of a government official or

[11] Indeed, the Court found that, even if it could be viewpoint-neutral, the policy restricting petitioning activity to a designated spot is content-based. (*See* **Exhibit 5** at 48:2-5, 53:6-11.)

[12] Although there is a dispute as to whether Mr. Deans was told to "register" or only give advance notice, both are prior restraints.

agency constitutes a prior restraint." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). It "intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.*

By Defendants' interpretation of NRS 293.127565, the Nevada Legislature insisted that public buildings must restrict First Amendment activity to designated spots, and that people **must** register before using such spots. Even if a person does not need to fill out a form, this requirement still chills protected speech, and serves as a content-based prior restraint on speech. *See Grant*, 486 U.S. at 422 n.5. Because there is a "heavy presumption against [the] constitutional validity" of this portion of the statute, if it does indeed apply the way Defendants claim it does, Defendants bear the burden of justifying this requirement. As explained in Section 5.2.2.2, *infra*, they cannot do so.

4.2.2.2 NRS 293.127565 Does Not Satisfy Strict Scrutiny

A regulation that only applies to petitioning is content-based. (*See* **Exhibit 5** at 48:2-5, 53:6-11); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). NRS 293.127565 (if interpreted in the manner urged by Defendants) is indeed content-based. Its terms are limited to "gather[ing] signatures on a petition." It does not restrict any other type of expressive activity. It applies to all buildings. This means that, even if this public plaza is not a traditional or designated public forum, the statute restricts one class of expressive activity at and outside **all** public buildings, including all that are traditional public fora.

The government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). It is apparent from the analysis in *NSG* that the Nevada Legislature passed NRS 293.127565 to **ensure** that people are able to engage in petitioning in and around **all** public buildings, not just traditional public forums. *See* 120 Nev. at 734. This **guarantee** may very well be a compelling government interest, but no interest is served by **limiting** these activities to a circumscribed "petitioning spot" in all cases. If applied in this manner, the statute directly opposes its stated purpose, and is not narrowly tailored. Interpreted in this manner, NRS 293.127565 is unconstitutional.

4.2.2.3 The Notice is a Prior Restraint

The Notice of Trespass is impermissible prior restraint too. It is based on a violation of the Library Rule prohibiting "[f]ailure to comply with reasonable staff instruction." (Doc. No. 3-3; Doc. No. 11-5.) There was no process before Deans's rights were violated. LVCCLD demanded that Deans stop his protected activity and move to a less effective spot in the Library entrance plaza. The employee called CSN's campus police, fabricating the allegation that Deans was blocking an entrance to the Library. (*See* **Exhibit 1** at ¶¶8-9). CSN's officers then issued the unlawful Notice of Trespass based upon the Library employee's statement. In less than an hour and on the unquestioned word of a single government employee, CSN's officers effectively sentenced Deans to a one-year loss of his First Amendment rights.

Banning a person from all public libraries in Clark County for an entire year without due process, without a hearing, or any articulation of any standards, is a prior restraint. Absent injunctive relief, Deans cannot circulate petitions on library property, speak to patrons on library property, read books in any library, or even enter the areas of any library explicitly designated as public fora. (*See* **Exhibit 8** at 5; *see also* **Exhibit 7** at 6). He is completely cut off from a font of knowledge and a popular forum for discussion. This prior restraint has no principled justification for existing.

Dated: October 26, 2016

Respectfully Submitted,

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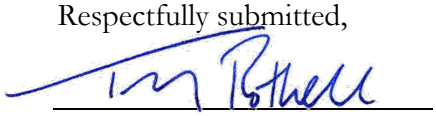
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 26, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully submitted,



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